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Supreme Court, U.S.
FILED

No. 08-290 AUG 29 2008

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In The

Supreme Court of the United States

UNITED STATES EX REL., MARSHA FARMER,

Petitioner,

v.

THE CITY OF HOUSTON AND
THE HOUSTON AREA URBAN LEAGUE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sections 3729(a)(2) of the False Claims Act imposes liability upon anyone who "makes, uses, or causes to be made or used, a false record or statement *to get* a false or fraudulent claim paid or *approved* by the Government." (Emphasis supplied.)

The district court granted summary judgment dismissing this action because of Petitioner's inability to show that any false claims were presented to the Government. In affirming the judgment the Court of Appeals declined to decide whether evidence of presentment was required and instead found that the entire summary judgment record would not support a jury finding as to the existence of a single false claim. The questions before this Court are:

1. Whether the Court of Appeals deprived Petitioner of due process by acting *sua sponte* in affirming the judgment on an issue not addressed by the trial court or briefed or argued by the parties.

2. Whether the decision below conflicts with *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242 (1986), and to what extent, if any, that case permits a reviewing court to examine the reasoning processes of a jury in determining whether certain evidence is sufficient to raise a fact issue.

3. Whether defendants, by agreeing that their contract was subject to federal audit, thereby established their intent that any false record or statement would be material to the Government's decision to approve any false or fraudulent claim, so as to create liability under §3729(a)(2) of the Act.

PARTIES TO THE PROCEEDING

The parties to this proceeding are the United States, the City of Houston and Houston Area Urban League, Inc., a Texas nonprofit corporation,

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Marsha Farmer respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals opinion is reported at 523 F.3d 333 (CA5 2008) (App. 1). The panel consisted of Jones, Chief Judge, and Smith and Reavley, Circuit Judges. The Chief Judge dissented. The order denying the petition for rehearing and petition for rehearing *en banc* is unpublished (App. 76). The opinions of the United States District Court for the Southern District of Texas are unpublished but are electronically reported at 2005 U.S. Dist. LEXIS 18387 (S.D. Tex. 2005) (App. 34), 2006 U.S. Dist. LEXIS 57741 (S.D. Tex. 2006) (App. 47) and 2006 U.S. Dist. LEXIS 84154 (App. 72).

JURISDICTION

The district court had jurisdiction over petitioner's claims pursuant to 28 U.S.C. §1331. The court of appeals had jurisdiction to review the district court's final judgment pursuant to 28 U.S.C. §1291. The court of appeals filed its opinion on March 25, 2008. It denied petitioner's timely petition for rehearing and rehearing *en banc* on June 2, 2008 (App. 76).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. §3729. False claims

(a) Liability for Certain Acts. Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement ***to get*** a false or fraudulent claim paid or ***approved*** by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

* * * *

(6) . . . *or*

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government. . . ."

(b) Knowing and Knowingly Defined. For the purpose of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts with deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no poof of specific intent to defraud required.

(c) Claim Defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(Emphasis supplied.)

STATEMENT

Marsha Farmer sued the City of Houston and Houston Area Urban League under the False Claims Act for false claims submitted for work done and materials supplied under the City of Houston's Emergency Home Repair Program, which was funded by

the Department of Housing and Urban Development (HUD) under a federal block grant. The purpose of the program was to repair homes for "low income, elderly and/or disabled persons," including houses that were damaged by Tropical Storm Allison in 2001 (R. 1214).[1] In her amended complaint she specified seventy-two instances of improper charges by the City of Houston and its subrecipient, Houston Area Urban League (one of four subrecipients). More than six thousand houses were repaired under the Program. Her action was filed on September 12, 2003. The Government did not intervene. As the result of her disclosures the Department of Housing and Urban Development shut down the Program[2] and began administrative proceedings to correct the many abuses which had occurred, using new personnel and the City of Houston's non-federal funds. These activities were ongoing when this action was dismissed.

Eleven months after the *qui tam* action was filed the Court of Appeals for the District of Columbia decided *United States of America ex rel. Totten v.*

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[1] *United States of America ex rel. Farmer v. City of Houston and Houston Area Urban League,* Civil Action No. H-03-3713, in the District Court for the Southern District of Texas, Houston Division.

[2] In declining to rule Marsha Farmer for costs the district court observed, "Finally, even though Ms. Farmer's legal claims failed, *the litigation* was productive in that it *led to the City's Emergency Home Repair Program being shut down* by HUD." *United States ex rel. Farmer v. City of Houston,* 2006 U.S. Dist. LEXIS 84154. (App. 72) (Emphasis supplied).

Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004), *cert. den.*, 544 U.S. 1032 (2005) announcing that 31 U.S.C. §3729(a)(2) included a presentment requirement. Based upon *Totten* the district court entered summary judgment against relator dismissing the *qui tam* action with prejudice.[3] She appealed to the United States Court of Appeals for the Fifth Circuit, *United States ex rel. Farmer v. City of Houston and Houston Area Urban League*, 523 F.3d 333 (CA5 2008), which affirmed the district court's judgment on March 25, 2008 and denied rehearing and rehearing *en banc* on June 2, 2008 (App. 76).

The court of appeals declined to decide the issue upon which the district court ruled against petitioner – presentment – and instead concluded that no reasonable jury could find or infer a knowing violation from Petitioner's factual record. The court in its opinion noted that this Court had granted certiorari in *Allison Engine Company, Inc., et al. v. United States ex rel. Sanders, et al.*, No. 07-214, ___ U.S. ___, 128 S. Ct. 2123 (June 9, 2008) (App. 9 at n.7).

The contract between the City of Houston and Houston Area Urban League as Contractor (R. 1193) provided that all records were subject to audit by the Government. (R. 1193 at 1197 and Ex. D, "CDBG

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[3] The district court had originally declined to dismiss the case, *United States ex rel. Farmer v. City of Houston*, 2005 U.S. Dist. LEXIS 18387 (S.D. Tex. 2005) (App. 34), but the *Totten* case caused the district court to dismiss it, *United States v. City of Houston*, 2006 U.S. Dist. LEXIS 57741 (S.D. Tex. 2006) (App. 47).

Program Requirements," R. 1234 at Section 16, "Records for Audit Purposes" R. 1240.)[4]

This case was dismissed by the district court because of Farmer's failure to show that any false record or statement was presented to the Government. However, this requirement ceased to exist when, on June 9, 2008, this Court held:

> "What §3729(a)(2) demands is *not proof that the defendant caused a false record or statement to be presented or submitted to the Government* but that the defendant made a false record or statement for the purpose of getting 'a false or fraudulent claim *paid or approved* by the Government.' Therefore, a subcontractor violates §3729(a)(2) if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the

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[4] "Without limitations to any other provision of the Agreement the Contractor shall maintain all records concerning the program or project financed under this Agreement for four years from the expiration date of the Agreement unless a longer period is required under 24 C.F.R. §85.42. The Contractor shall maintain records required by 24 C.F.R. §135.120 for the period that HUD requires the records to be maintained. The contractor will give the City, HUD, the Comptroller General of the United States, the General Accounting Office, or any of their authorized representatives access to and the right to examine, copy or reproduce all records pertaining to the acquisition of the project and the operation of the program or project. The right to access shall continue as long as the records are required to be maintained." (R. 1240).

> Government to pay its claim." (Emphasis supplied.)

Allison Engine Co., Inc., et al. v. United States ex rel. Sanders, et al., No. 07-214, ___ U.S. ___ decided June 9, 2008. Petitioner unsuccessfully sought stay of the mandate based upon the *Allison* decision (App. 78).

The defendants in *Allison* were subcontractors. Here the defendants are the recipient of federal funds, the City of Houston, and a contractor, Houston Area Urban League, one of four subrecipients.[5] The work was done by numerous subcontractors hired by the subrecipients. The City submitted a drawdown request against their HUD letter of credit in the amount necessary to reimburse the subrecipients, such as Houston Area Urban League, for the money the subrecipients had paid the subcontractors.

When HUD shut down the Program it mandated that

> "all units assisted from FY 2000 to present must be reinspected by qualified individuals and the properties must now be repaired properly. Additionally, all amounts that were improperly charged to the CDBG program must be repaid to the program from non-federal funds. This includes, but is not limited to, work paid for that was not completed

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[5] Houston Area Urban League, National Association of Minority Contractors, Sheltering Arms and Houston Housing Finance Corporation.

and payments for materials in excess of what was actually installed." (R. 1782 at 1783.)

The issue on which the majority based its decision was not the stated basis for the trial court's judgment. This Court should not assume that it was a tacit basis of the decision. The dissenting judge challenged the appropriateness of what it characterized as "the majority's sprawling factual determination" in reaching the conclusion that no "reasonable jury" could infer fraud from Petitioner's evidence and concluded, to the contrary, that the factual evidence showed the program to have been "rife with fraud." (App. 29).

Petitioner's motion for rehearing *en banc* was denied (App. 76).

REASONS FOR GRANTING THE WRIT

I. THE RULE THAT A REVIEWING COURT CAN AFFIRM A JUDGMENT ON ANY GROUNDS SUPPORTED BY THE RECORD DOES NOT EMPOWER THAT COURT TO AFFIRM *SUA SPONTE* ON GROUNDS NOT ADDRESSED BY THE DISTRICT COURT AND ON WHICH APPELLANT DID NOT HAVE AN OPPORTUNITY TO BE HEARD.

Acting under the premise that as a reviewing court it could affirm on any ground supported by the record, the majority below examined the evidentiary

record and decided that a reasonable jury could not find that there had been a "knowing" violation of §3729(a)(2) of The False Claims Act.[6] This fact issue was neither addressed or argued by the parties below nor did it form the basis of the motion for summary judgment filed by the City. According to Houston Area Urban League "[t]he sole question before this Court is one of statutory interpretation: whether presentment is a required element of an FCA Claim" Houston Area Urban League brief below at page 24 n.10. The dissenting judge characterized the majority's decision as "nothing short of a windfall [to City], a *sua sponte* summary judgment on appeal." (App. 26).

Petitioner has located no federal appellate-court case where the rule has been extended or interpreted to authorize a review of evidence regarding an issue that was neither addressed by the trial court nor briefed or argued by the parties on appeal. Petitioner had no notice that the court would do what it did, examine the record and regard this issue as dispositive. Its action in this respect, Petitioner submits, deprived Petitioner of both substantive and procedural due process. The court of appeals should have at least asked Farmer for a supplemental brief on this subject.

In general terms, fair notice and the opportunity to be heard are essential elements of due process. In

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[6] "Knowingly" is defined in sec. 3729(b) as "actual knowledge," "deliberate ignorance," or "reckless disregard of the truth or falsity of the information."

Day v. McDonough, 547 U.S. 198, 210 (2006), *pet. for reh'g denied*, 127 S. Ct. 1394 (2007), this Court said: "Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." The Court cites *Acosta v. Artuz*, 221 F.3d 117 (2d Cir. 2000), where the Second Circuit addressed in detail authorities dealing with the necessity of an opportunity to address issues raised *sua sponte*. ("The problem with the court's dismissal was not that it was done on the court's own motion but rather that it was done without affording [petitioner] notice and opportunity to be heard." *Id.* at 123.) See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (minimal procedural due process protection [in class action context] requires "notice and opportunity to be heard and participate"); *Ministry of Defense v. Elahi*, 546 U.S. 450, 453 (2006) (judgment reversed where no reasonable opportunity to argue controlling point provided); *Burns v. United States*, 501 U.S. 129, 137 (1991) (to satisfy due process, court construes statute to require "*both* notice *and* a meaningful opportunity to be heard" [emphasis in original]); *Beltran v. Myers*, 451 U.S. 625, 628 (1981) (petitioner should have opportunity to argue legal issue not addressed by parties); *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (imprudent to address issue not raised by parties); *Mackey v. Montrym*, 443 U.S. 1, 20 (1979) ("... the constitutional guarantee of procedural due process has always been understood to embody a presumptive requirement of notice and a meaningful opportunity to be heard *before* the State acts finally to deprive a

person or his property" [citations deleted], per Stewart, dissenting).

The issue here is purely one of fact.[7] The lower court's action in affirming *sua sponte* on the theory that it could do so on any ground supported by the record was a clearly erroneous application and unsupportable extension of that rule. It presents an important issue regarding the limits of the rule and how far a reviewing court can go, consistent with due process, in its application.

II. THE FIFTH CIRCUIT'S STATEMENT AND APPLICATION OF THE RULE THAT A JUDGMENT CAN BE AFFIRMED ON ANY GROUND SUPPORTED BY THE RECORD DIFFERS WITH ITS SCOPE AND APPLICATION IN OTHER CIRCUITS.

The rule invoked by the majority is generally stated in the Fifth Circuit without any qualification. This case is an example. See also, *e.g.*, *Cal. Gas Transp., Inc. v. N.L.R.B.*, 507 F.3d 847, 853 (CA5 2007); *United States v. Dow Chem. Co.*, 343 F.3d 325, 330 (CA5 2003).

Some circuits, on the other hand and with an eye on due process, state the rule as being limited to

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[7] Petitioner, of course, recognizes that matters involving jurisdiction, standing, and waste of the court's time are appropriately raised *sua sponte*. This is not such a case, however.

situations in which the parties have had the opportunity to address the issue.[8] For example, see D.C. Circuit: *Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1361-62 (D.C. Cir. 1982) (court free to affirm on any ground supported by the record, "provided the parties have had an opportunity to discuss it in their briefs"); Tenth Circuit: *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1152 (CA10 2007) (court can affirm on any ground supported by the record "provided the parties have had an opportunity to address such ground), *Garrison v. Gambro, Inc.*, 428 F.3d 933, 939 (CA10 2005) (affirmance appropriate "provided the litigants have had a fair opportunity to develop the record"), *Maldonado v. City of Altus*, 433 F.3d 1294, 1303 (CA10 2006) (court can affirm "so long as the parties have had a fair opportunity to address that ground"); Ninth Circuit: *Paskaly v. Seale*, 506 F.2d 1209, 1211 (CA9 1974) (court can affirm on any ground supported by the record "provided the parties have had an opportunity to discuss it in their briefs"), *Lakeview Dev. Corp. v. South Lake Tahoe*, 915 F.2d 1290, 1299 (CA9 1990), *cert. den.*, 501 U.S. 1251 (1991) (same), *Scholar v. Pacific Bell*, 963 F.2d 264 (CA9 1992) (same); Fourth Circuit: *Hillson Partners Ltd. Partnership v. Adage, Inc.*, 42 F.3d 204 (CA4 1994) (court can affirm where grounds had been presented both to the district court and on appeal so that the nonmoving party has had fair opportunity to contest

[8] Even in these circuits, however, the rule is occasionally stated without qualification.

them at both levels), *Charbonnages de France v. Smith,* 597 F.2d 406, 416 (CA4 1979) (court can affirm on alternative grounds "presented both to the district court and on appeal so long as the nonmoving party has had fair opportunity to contest them at both levels"); Sixth Circuit: *Sequoyah v. Tennessee Valley Authority,* 620 F.2d 1159, 1165 (6th Cir. 1980), *cert. den.*, 449 U.S. 953 (1980) ("the grounds of our decision are supported by the record and the parties have fully briefed and argued these grounds").

This rule has been and continues to be a significant part of the federal appellate jurisprudence. It has been employed in hundreds of cases and continues to be used routinely.[9] The issuance of a *writ of certiorari* is warranted to correct its misapplication here, to harmonize its expression and application among the circuits, and specifically to make clear that it does not extend to the *sua sponte* determination of issues that the parties have not had an opportunity to address.

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[9] The origin of the rule appears to have been to enable a party to defend a judgment in its favor on alternative grounds without the necessity of a cross-appeal. *Cf. United States v. American R. Express Co.*, 265 U.S. 425, 435 (1924); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 (1977); *Dandridge v. Williams*, 397 U.S. 471, 475 (1970). As applied here, however, the progeny no longer resemble the ancestor.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *ANDERSON V. LIBERTY LOBBY, INC.*, 477 U.S. 242 (1986), AND INVADES THE PROVINCE OF THE JURY.

In *Anderson*, this Court addressed Fed. R. Civ. P. 56 and specifically set forth the ground rules for its application, stating that credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the court, and that the evidence of the non-movant is to be believed and "all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The majority below, while recognizing *Anderson* as controlling, takes an analytical path and reaches a decision in direct conflict with *Anderson's* teaching and holding. It engages in a detailed review of the evidence, looks into the minds of the jurors, and draws its own inferences, ultimately concluding that no reasonable jury could find a "knowing" violation rather than "mere negligence" in the way the City obtained funds from HUD.

The extent to which the majority projects itself into the mind and reasoning processes of the jury is apparent from its opinion.

The dissent draws a categorically different conclusion from the evidence. In the course of its refutation of the majority's interpretation, it states that the evidence shows the program involved to have been "unsupervised, rife with fraud, and

effectively unreviewable due to an obvious lack of documentation." (App. 29). After a similarly detailed counter-analysis, the dissent comments that the majority's finding of no fraud is "hardly credible, much less beyond reasonable debate" and concludes that there was "evidence of clear and pervasive fraud in this case." (App. 33).

Applying the directed-verdict standard under Rule 50(a) to Rule 56, this Court has observed that "if reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Anderson* at 250. If reasonable judges can differ, as here, with respect to whether the evidence reflected a "knowing" violation of §3729(a)(2), it seems likely, if not certain, that reasonable jurors could do likewise and that a fact issue was raised by Petitioner's evidence precluding summary judgment.[10] Petitioner can fashion a no more compelling argument for the granting of *certiorari* and review by this Court than is derived from a plain reading of the opinions of the majority and the dissent. They speak for themselves.[11]

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[10] Both the majority and the dissent agreed that the evidence was not sufficient to raise a fact issue with respect to any conspiracy between the defendants under §3729(a)(3) of the Act. Petitioner does not seek certiorari with respect to this holding.

[11] Petitioner does not suggest that the decision on whether a reasonable jury could reach a conclusion one way or another from evidence in the record must always be made by a unanimous court, but, when the divergence on inferences and conclusions to be drawn from the evidence is pronounced as it is here,

(Continued on following page)

Under the majority's reading of *Anderson*, a reviewing court is free to engage in an analysis of factual evidence from which differing conclusions can be drawn under the aegis of determining whether evidence is sufficient to affirm the judgment. This reading of *Anderson* so limits its application that it leaves the reviewing court with virtually unchecked authority. This is not what the court said in *Anderson* nor is this what *Anderson* permits. See also *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149-50 (2000) (court to examine record as a whole and draw all reasonable inferences in favor of non-movant; "court may not make credibility determinations or weigh the evidence"); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 373 (1995) (removing issue from jury appropriate only where facts and law reasonably support only one conclusion); *Certiorari* is warranted both to correct the manifest error here, as well as to clarify the limits that *Anderson* imposes on the reviewing court's authority to draw inferences from the facts and evidence.

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there exists at least a *prima facie* indication that the issue is properly one for the jury, not the court.

IV. FALSE RECORDS OR STATEMENTS USED TO GET A FALSE CLAIM APPROVED BY THE GOVERNMENT ARE ACTIONABLE UNDER §3729(A)(2) OF THE ACT WITHOUT THE NECESSITY OF PROVING THAT SUCH CLAIMS WERE PAID DIRECTLY BY THE GOVERNMENT TO THE RECIPIENT OF FEDERAL FUNDS.

The False Claims Act punishes several actions:

1. Attempting to defraud the Government by presenting a false claim §3729(a)(1);

2. Using a false record or statement to get a false or fraudulent claim *paid* by the Government, §3729(a)(2);

3. Using a false record or statement to get a false or fraudulent claim *approved* by the Government, §3729(a)(2); and

4. Using a false record or statement to conceal an obligation to the Government, §3729(a)(7), added in 1986.

The Allison case delineates what claims are "paid by the Government" in such a way as to exclude claims that are paid by recipients of federal funds such as colleges and universities, or the City of Houston. But the category of false claims *approved* by the Government would seem to be much broader and would include all claims which the defendants agreed in writing were to be audited by the Government. Under this Court's holding in Allison, " . . . a plaintiff asserting a §3729(a)(2) claim must prove that the

defendant ***intended*** that the false record or statement be ***material*** to the Government's decision ***to*** pay *or* ***approve*** the false claim." (Emphasis supplied). The Government obviously under the law can and does approve claims paid by recipients such as the City of Houston. *Petitioner submits that here the defendants have expressly agreed to the materiality of the information which they are required to make available to auditors under the Program.* This was not a fact issue.

In this case the district court adopted a very restricted interpretation of the meaning of "approval." The district court held:

> "Although HUD's audit may be construed as a type of 'approval' process . . . , the relevant point of Government 'payment or approval' for purposes of the False Claims Act occurred when HUD approved the City's plan for using the federal funds and established the line of credit from which the City could withdraw the funds at its own discretion." (App. 65).

However, in its *amicus curiae* brief in the court of appeals the Government pointed out:

> "As noted, in many instances, to ensure that the objectives of a grant are fulfilled in a timely manner the Government preliminarily approves the disbursement of grant funds to the federal grantee, who may then use those funds to fulfill the purpose of the grant, subject to a final audit or other accounting by the Government of how the

> grant monies were spent. In this manner the grantee is able to immediately utilize the grant funds. The instant case demonstrates why this ability is often critical. Here, the grant monies were used to help repair the homes of low and moderate income persons, including storm victims, such as relator. If each such repair had to be approved by the Federal Government, it would have taken much longer for these repairs to be completed. If the district court's ruling were to stand, then the Government would either be forced to abandon this type of grant method – with significant consequences to the ultimate beneficiaries of these grants – or forgo its principal tool to combat fraud on such funds." (Government brief in the court of appeals at 15-16).

Under the restrictive interpretation adopted by the district court, which was before the court of appeals for review, the pertinent approval for purposes of the False Claims Act would have to occur before the plan for expenditure was even approved, i.e., before any contracts are entered into, before any work was done and before any false invoices were submitted. Any false records and statements made and used later even if approved would not be covered by the Act. Congress did not intend such a narrow reading of the Act. If this case is to be remanded it is important for this Court to provide guidance to the lower courts as to the meaning of "approved" in 31 U.S.C. §3729(a)(2). Clarification of this issue is an important reason for granting certiorari.

The panel opinion seems to suggest that these Government programs are properly left in the hands of the administrative agencies created to administer them and that interference by outsiders like Marsha Farmer is unwarranted. To the contrary, Farmer has performed a vital service in giving a skeptical look at what was going on, conducting her own investigation, prompting a monitoring program by HUD and ultimately causing the entire program to be shut down. By causing the program to be shut down she may have saved the Government millions of dollars. This 1863 statute is still viable.

In *Allison* this Court considered how far liability should extend. The Court was aware that having to prove presentment could be very difficult as illustrated by *United States ex rel. El Amin v. The George Washington University*, 522 F. Supp. 2d 135 (2007). There relators spent ten years in discovery and performed a manual search in the Federal Records Center of millions of pages of medicare documents but were only able to come up with 223 hard copy claim forms of which only fifty related to the anesthesiologist named in the complaint. The court noted that some claim forms were submitted electronically and others were submitted in hard copy format, observing that "neither Defendant nor Relators seem to know when Defendant submitted claims electronically and when it submitted them in hard copy format." This Court in *Allison* relieved plaintiffs of having to search for and find all of the records of

presentment and allowed plaintiffs to get by with showing payments by the Government.

In the case at bar letters of credit were used. As a matter of regulatory procedure disbursements would not be made without the use of electronic drawdown vouchers prescribed by the U.S. Treasury Financial Manual Part 6-2040.10, promulgated pursuant to 31 C.F.R. §210.3 *et seq.*, which provides:

> "The recipient organization will submit a properly completed payment voucher to the commercial bank for transmission to the appropriate Federal Reserve bank or branch as funds are required for immediate disbursement needs. At the time, the commercial bank may credit the account of the recipient organization with the amount of funds being drawn down if agreed to by the bank and the recipient organization.
>
> "The Federal Reserve will review the payment voucher for completeness and correctness, verifying the letter-of-credit number, agency location code (ALC, which was formerly referred to as the eight digit agency station symbol), signatures, and that the amount requested is within the available balance of the letter of credit. "The Federal Reserve bank or branch credits the reserve account of the commercial bank, advises the commercial bank of acceptance of the payment voucher, and charges the account of the U.S. Treasury."

And in Section 2025.10 it is provided:

> "All disbursements, whether in cash, or by checks or electronic payments drawn on the U.S. Treasury or designated depositary banks, for authorized and lawful payments and/or refunds of amounts collected, shall be supported with sufficient information on the disbursement vouchers, or on documents attached to them, to enable the audit of the transactions of certifying and disbursing officers, as required by law."

It is believed that all funds paid by the Government under the Program were paid to the City, which subsequently paid money to the subrecipients. However, all such sums should be held to be subject to federal audit – i.e., approval – under §3729(a)(2).

The question arises in cases under the False Claims Act of how many layers of liability could exist. It would seem that any supplier who signs a purchase order marked "subject to federal audit" by doing so would agree to the materiality of the information to be contained in invoices later submitted pursuant to that purchase order.

V. THE AGREEMENT BETWEEN THE CITY OF HOUSTON AND HOUSTON AREA URBAN LEAGUE THAT THE WORK UNDER THEIR CONTRACT WOULD BE SUBJECT TO FEDERAL AUDIT WAS IN ITSELF PROOF THAT THEY INTENDED THAT ANY FALSE RECORDS OR STATEMENTS WOULD BE MATERIAL TO THE GOVERNMENT'S DECISION TO APPROVE ANY SUCH CLAIMS WITHIN §3729(A)(2).

Petitioner submits that there could be no more conclusive proof of intent and materiality than the express agreement between the City of Houston and Houston Area Urban League that what they did under their contract would be subject to federal audit. The court of appeals committed clear error in purporting to make its own findings of fact concerning these issues. If intent that false records or statements be material is not established as a matter of law then a jury should pass on these issues. The charge could use the definition of "knowingly" set out in the False Claims Act, and it would not be necessary to use terms like "scienter" or "aggravated gross negligence" in the charge.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Counsel of Record

REVISED APRIL 14, 2008
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20740

UNITED STATES OF AMERICA ex rel. MARSHA FARMER,

Plaintiff-Appellant,

v.

CITY OF HOUSTON; HOUSTON AREA URBAN LEAGUE,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
No. 4:03-CV-3713

(Filed Mar. 25, 2008)

Before JONES, Chief Judge, REAVLEY and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Marsha Farmer brought an action on behalf of the United States against the City of Houston, Texas, and the Houston Area Urban League ("HAUL"), alleging violations of the False Claims Act ("FCA"),

31 U.S.C. § 3729(a). Farmer claimed that defendants unlawfully received federal funds from the United States Department of Housing and Urban Development ("HUD") based on false and fraudulent information. After the United States declined to intervene and extensive discovery had been conducted, defendants moved for summary judgment, and the city moved to dismiss for lack of jurisdiction. The district court granted the motions for summary judgment and denied the motion to dismiss.

Farmer appeals. Because she is unable to show that the city or HAUL acted with knowledge of any falsity or that defendants agreed with each other to defraud the government, we affirm.

I.

Farmer's action concerns the city's Emergency Home Repair Program ("EHRP"), which is funded by HUD as part of its Community Development Block Grant program ("CDBG"), under which HUD granted the city access to a line of credit to be used for certain types of residential repair projects. A requirement of receiving these funds was that the city's management and expenditures were expressly subject to audit by HUD.[1]

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[1] Under the CDBG program, HUD is required "at least on an annual basis" to "make such reviews and audits as may be necessary" to ensure that a CDBG grantee's use of funds is appropriate. 42 U.S.C. § 5304(e). If HUD determines that CDBG

(Continued on following page)

The city, in turn, chose HAUL, a non-profit corporation, to perform certain EHRP projects. HAUL elected to retain third-party contractors – as opposed to its own employees – to perform the relevant repairs. The city reimbursed HAUL based on invoices that were submitted by those contractors. The reimbursements were paid from CDBG funds.

Farmer's involvement with the EHRP began in 2001 when she applied for assistance after her roof suffered damage during tropical storm Allison. Inspectors were dispatched to determine whether Farmer qualified for the EHRP. The inspectors examined her property and, based on their estimates of what it would cost to complete the necessary repairs, determined that she did not qualify,[2] so no work was performed on her house.

When Farmer reviewed the inspector's written estimates, however, she noticed that something seemed amiss: The estimates included several incorrect quantities of materials, most notably that 4,000 square feet of roofing material would be required. Only half that amount had been needed the last time Farmer had had her roof replaced. She became suspicious.

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funds have been used improperly, it is authorized to request the grantee to reimburse HUD for the unauthorized expenditures. *See* 24 C.F.R. § 570.910(b)(5).

[2] In 2001, when Farmer first applied to the EHRP, the repair cost limits were $15,000. In about late 2002, these limits were increased to $20,000.

Using data obtained by means of the Texas Public Information Act, Farmer assiduously investigated other properties assigned to HAUL under the EHRP. She compared, for instance, the city's disbursements to HAUL for roof repairs with estimates of roof size that she obtained from the Harris County Appraisal District. Using a similar approach, she analyzed expenditures for gutters, water lines, windows, smoke detectors, counter tops, foundations, and the like. Based on her analysis, she believed the EHRP was being bilked, with reimbursements being approved and building materials being paid for far in excess of what was necessary or actually provided.[3]

II.

Using that research, Farmer alleged that defendants had made false and fraudulent claims that had been paid using federal funds. In September 2003, after providing notice to the Attorney General of the United States and to the United States Attorney for the Southern District of Texas, she filed a complaint on behalf of the United States, alleging that defendants had violated the FCA. She also claimed that

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[3] HUD apparently agreed with Farmer, at least as to whether the reimbursements received by HAUL were exorbitant. HUD audited a number of reimbursement requests, including the claims alleged by Farmer to be false, and, as a result of the audit, suspended its involvement with the EHRP and requested the city to reimburse HUD for all improper expenditures.

defendants had failed to comply with the EHRP requirements, and she asserted a claim for money had and received.

After the United States decided not to intervene, Farmer filed an amended complaint, and defendants each filed a motion to dismiss. The court granted those motions in part, dismissing Farmer's claims for money had and received and for defendants' alleged failures to comply with program requirements; the court permitted the FCA claims to go forward.

Following discovery, defendants moved for summary judgment, and the city once again moved to dismiss, this time based on allegedly newly discovered information that Farmer was not an "original source" of the information about the supposed fraudulent claims and thus was jurisdictionally barred from bringing an FCA suit under 31 U.S.C. § 3730(e)(4)(A). In support of their summary judgment motions, defendants argued that, for myriad reasons, Farmer had failed to establish a *prima facie* case under the FCA.[4]

Regarding § 3729(a)(2), defendants argued that under *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), a plaintiff must present evidence that a false or fraudulent claim was

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[4] In her response to defendants' motions for summary judgment, Farmer made it plain that she was pursuing claims only under 31 U.S.C. § 3729(a)(2) and (3) and was abandoning any claims under § 3729(a)(1) and (4)-(7).

presented to an officer or employee of the federal government. According to defendants, Farmer could not establish that such a presentment had taken place, because HUD's post-disbursement audit process was legally inadequate, and Farmer could point to no other potential presentment. Also regarding § 3729(a)(2), defendants – primarily HAUL – argued that Farmer had failed to proffer sufficient evidence from which a reasonable jury could conclude that there were any knowingly false statements, a fundamental scienter condition for liability under the FCA.[5] For § 3729(a)(3), defendants argued that there was insufficient evidence from which a reasonable jury could find a conspiracy between the city and HAUL to defraud the federal government.

The district court granted defendants' respective motions for summary judgment and denied the city's motion to dismiss as moot. Agreeing with the analysis in *Totten,* the court concluded that § 3729(a)(2) contains a presentment requirement and that Farmer had failed to satisfy it. The court also held that Farmer had failed to produce evidence that the city and HAUL had entered into an agreement to get a false or fraudulent claim paid or approved by the

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[5] HAUL also argued that because HUD's and the EHRP's standards for required documentation were vague, HAUL's submissions were not "false," because they were based on a good faith, reasonable interpretation of those standards. HAUL likewise argued that any alleged misstatements were immaterial.

federal government, so the court dismissed the § 3729(a)(3) claim with prejudice.

III.

We review a summary judgment *de novo* under Federal Rule of Civil Procedure 56. *See, e.g., TIG Ins. Co. v. Sedgwick James,* 276 F.3d 754, 759 (5th Cir. 2002). A summary judgment will be affirmed "only if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' when viewed in the light most favorable to the non-movant, 'show that there is no genuine issue as to any material fact.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986)). Though the "court must draw all justifiable inferences in favor of the non-moving party," a genuine dispute about a material fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.*

"[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial" and "mandates the entry of summary judgment" for the moving party. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). "Once the moving party has initially shown 'that there is an absence of evidence to support the non-moving party's cause,' the non-movant must come forward with 'specific facts' showing a genuine factual issue for trial." *TIG Ins.,* 276 F.3d at 759 (quoting *Celotex,* 477 U.S. at 325). "Conclusional

allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial." *Id.*

The district court held that § 3729(a)(2) implicitly – as § 3729(a)(1) does explicitly – contains a presentment requirement. The court also rejected Farmer's contention that even if there is such an implicit presentment requirement, it was satisfied by the EHRP's post-disbursement audit requirement. The court held that because the allegedly false documents were not submitted to HUD at the time of, or in conjunction with, the city's use of federal funds, there was no presentment under the FCA. The court finally held that there was insufficient evidence from which a reasonable jury could find a conspiracy between the defendants, so it granted summary judgment on Farmer's § 3729(a)(3) claim. Farmer contends that each of these rulings is error.[6]

IV.

A.

The question whether § 3729(a)(2) contains a presentment requirement – and if so, what that requirement entails – is both intricate and unsettled. The threshold question whether presentment is

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[6] The United States as *amicus curiae* similarly contends that the district court's rulings on § 3729(a)(2) are in error.

necessary under § 3729(a)(2) has divided the courts of appeals.[7] The second question – what sort of presentment § 3729(a)(2) requires – is by and large unexplored. Accordingly, it is not surprising that there is uncertainty as to whether HUD's statutory obligation to audit its CDBG disbursements constitutes presentment for purposes of § 3729(a)(2), or whether instead the district court is correct that presentment under § 3729(a)(2) requires a concurrence of payment and presentation of falsity.

We need not delve into the sinews of § 3729(a)(2), because Farmer's claim fails in a more fundamental way: She cannot show that defendants knew of any alleged falsehoods in the documents at issue. Without establishing knowledge of falsity, Farmer's § 3729(a)(2) claims are *prima facie* incomplete, so it is unnecessary to address whether the presentment requirement (if one exists) has been satisfied.[8]

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[7] *Compare Totten* (holding that presentment is required under § 3729(a)(2)) with *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610 (6th Cir. 2007) (presentment not required), *cert. granted*, 128 S. Ct. 491 (2007).

[8] Though the district court granted summary judgment based on lack of presentment, "[i]t is an elementary proposition, and the supporting cases too numerous to cite, that this court may 'affirm the district court's judgment on any grounds supported by the record'. . . ." *Sobranes Recovery Pool I, LLC v. Todd & Hughes Constr. Corp.*, 509 F.3d 216, 221 (5th Cir. 2007) (citing *Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992)).

B.

Under § 3729(a)(2), a person is liable who "*knowingly* makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." § 3729(a)(2) (emphasis added). Though the FCA is plain that "proof of specific intent to defraud" is not necessary, *see* § 3729(b), that *mens rea* requirement is not met by mere negligence or even gross negligence.[9]

Instead, "knowingly" is defined in the FCA as including three separate meanings: (1) "actual knowledge"; (2) "deliberate ignorance of the truth or falsity of the information"; or (3) "reckless disregard of the truth or falsity of the information." § 3729(b). Given this definition of "knowingly," courts have found that the mismanagement – alone – of programs that receive federal dollars is not enough to create FCA liability.[10]

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[9] *See United States v. Krizek*, 111 F.3d 934, 941-42 (D.C. Cir. 1997) (noting that at least "aggravated gross negligence" or "an extreme version of ordinary negligence" is necessary under the FCA). *Accord United States ex rel. Aakhus v. Dyncorp*, 136 F.3d 676, 682 (10th Cir. 1998); *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1478 (9th Cir. 1996); *UMC Elecs. Co. v. United States*, 43 Fed. Cl. 776, 792 n.15 (1999).

[10] *See Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 789 (4th Cir. 1999) ("The allegations . . . amount to no more than allegations of poor and inefficient management of contractual duties. The district court was correct in holding that poor . . . management is not actionable under the False Claims Act."); *United States ex rel. Aflatooni v. Kitsap Physicians Servs.*,

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C.

Farmer failed to present specific evidence from which a reasonable jury could find that defendants acted with knowledge, as defined by the FCA, that any document at issue contained false and fraudulent information. For instance, in her response to HAUL's motion for summary judgment, Farmer argued that she "adduced ample evidence that the Urban League got claims paid based upon overstatements of quantities needed and used, in order to make the payments look legal when they were not – in order to deceive auditors." R. 2331.[11] She then contended that "[i]t is for a jury to infer whether one or more of the amounts paid to the Urban League were based upon actual knowledge, or deliberate ignorance, or reckless disregard of the truth or falsity of the claims." *Id.*

On closer review of the record, however, it becomes apparent that no reasonable jury could conclude that the knowledge requirement has been met. Though her pleadings are not especially plain on this point, our examination of the record shows the evidence produced by Farmer as to defendants' *mens rea* is as follows:

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163 F.3d 516, 526 (9th Cir. 1999) (The "allegations regarding . . . deficient auditing procedures is not evidence of fraud, although it may suggest that KPS was negligent. . . .").

[11] The citations beginning with "R." are references to pages in the record.

- "[T]here had been earlier instances of overcharges, and prior monitoring of the [EHRP]. . . ." R. 2332.
- Records of competitive bids from third-party contractors were required but were frequently missing. R. 1754, 2452-54.
- In a HUD official's opinion, many third-party contracts and reimbursement requests did not have "an acceptable cost breakdown." R. 1753, 2467.
- There was evidence that "contractors were just assigning prices to accommodate the amount of the grant," because the requests were equal to the maximum value permissible under the EHRP. R. 1753.
- The mistaken estimates were uniformly overestimates. *See* R. 2331.
- There were certificates of completion wherein a notary certified that the documents were subscribed before the notary that were, in fact, unsubscribed. *See* R. 2424-25, 2456.
- Some third-party contracts allowed administrative expenses of at least 20% and possibly more, despite a HUD regulation that capped administrative expenses at 20%, and, contrary to HUD regulations, these administrative expenses were expressed as a fixed percentage of costs. *See* R. 2455.
- Because of inadequate oversight, overcharges, failure to adjust costs to correct excessive estimates, and charges for materials not provided,

> HUD suspended its participation with the EHRP, and the city agreed to reimburse HUD for overpayments made to third-party contractors and to correct unacceptable work. *See, e.g.*, R. 1747-48, 1753, 1789.

From this circumstantial evidence, Farmer claims that the question whether defendants acted with knowledge should go to the jury, noting that "[c]ircumstantial evidence can be as convincing as lipstick on your collar (or Monica Lewinsky's blue dress)." R. 2332. Though in certain cases, circumstantial evidence can be sufficient to withstand summary judgment, this is not such a case, in light of how a reasonable jury would esteem the available evidence.

A jury would necessarily think carefully about the context in which defendants' conduct occurred. *Cf. McKethan v. Tex. Farm Bureau*, 996 F.2d 734, 743 (5th Cir. 1993). It would, for instance, consider the relative ease by which defendants would have been able to determine the nature and extent of the alleged overcharges when the alleged overcharges were happening. To decide whether defendants were negligent or, as required by the FCA, worse than negligent, the jury would evaluate defendants' conduct in light of the opinion of HAUL's expert that many factors can affect measurements in residential repair projects, including the style of home, overages, residential conditions, and the contractor's expertise, and changes to the property that are not reflected in the Harris County Appraisal District's estimates. *See* R. 1171, 733-39.

These additional factors would suggest to the jury that even if the reimbursement forms submitted by the third-party contractors in fact contained false statements, it would have been relatively difficult for the defendants to ascertain that fact. Granted, defendants might have been negligent in failing to identify the overcharges, but the jury would conclude that the presence of these additional factors tends to mitigate against finding that defendants acted knowingly, especially given that Farmer produced no countervailing evidence that the factors set forth by HAUL's expert were not reasonably part of the construction process.

Then, the jury would consider how blatant were defendants' alleged violations of the regulations. After all, if the violations were particularly brazen, the jury would be more likely to conclude that defendants were intentionally or recklessly violating the regulations. From that it is but a small step to conclude that defendants were intentionally or recklessly misusing CDBG funds. On the other hand, if the regulations were relatively opaque, and if the infractions were relatively minor or technical, the jury would be inclined to believe it less likely that defendants were "knowingly" acting for purposes of the FCA.[12]

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[12] *See United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 682 (5th Cir. 2003) (en banc) (Jones, J., specially concurring) (noting that "claimants [do not] 'knowingly' present[ ] false claims where there were instances of 'mere' contractual or regulatory noncompliance," because the "FCA is not an appropriate

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A jury would conclude that the regulatory environment in which defendants were operating was not nearly as cut-and-dry as Farmer's proffered evidence suggests. Indeed, during deposition, HUD officials admitted that there is nothing in HUD's CBDG regulations that objectively defines what is a reasonable cost. *See* R. 1171, 1304. With this information in mind, the jury would be considerably less likely to infer that the alleged overcharges and other misstatements show that defendants acted "knowingly" for FCA purposes.

At the same time, the jury would consider whether the alleged violations were serious enough that they are not the sort of errors that would occur negligently; for example, a mere ministerial error does not carry the same evidentiary weight as does a

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vehicle for policing technical compliance with administrative regulations. The FCA is a fraud prevention statute; violations of [agency] regulations are not fraud unless the violator knowingly lies to the government about them.") (quoting *United States ex rel. Lamers v. City of Green Bay,* 168 F.3d 1013, 1019 (7th Cir. 1999)); *see also United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997) ("We agree with the district court that claims for services rendered in violation of a statute do not necessarily constitute false or fraudulent claims under the FCA."). In fact, if the regulations were thoroughly unclear, as a matter of law, the FCA's knowledge and falsity requirements have not been met. *See Southland Mgmt.*, 326 F.3d at 684 (Jones, J., specially concurring) ("Where there are legitimate grounds for disagreement over the scope of the contractual or regulatory provision, and the claimant's actions are in good faith, the claimant cannot be said to have knowingly presented a false claim.").

violation of a more important rule. *See, e.g., Southland Mgmt.*, 326 F.3d at 682 (noting that there is no FCA liability for "'mere' . . . regulatory noncompliance"). With this in mind, a jury would put little weight on the fact that some documents were notarized without the full slate of required signatures. Though abuses of the notarization process are not trivial, no reasonable jury would conclude from such evidence that defendants knowingly or recklessly were perpetuating a fraud on the United States. The logical connection between these omissions and knowingly submitting false claims is too attenuated.

The jury would similarly evaluate evidence that some contracts with third-parties contained improperly structured administrative expenses. Such evidence might suggest that the EHRP was negligently administered, but that is not the type of error that could reasonably support an inference of reckless disregard for the truth, much less deliberate ignorance or actual knowledge. In the absence of additional specific information that casts a sinister shadow onto that evidence, no reasonable jury could consider it sufficient to meet the FCA's demanding knowledge requirement.

The evidence that most strongly favors Farmer is the evidence concerning inadequate cost breakdowns, non-competitive bidding, and reimbursement requests and estimates that coincided exactly with the maximum amount permissible under the EHRP. Again, however, the jury would consider the context in which defendants were operating.

For example, though a HUD official was of the opinion that the cost breakdowns were inadequate, our survey of the (at times difficult to follow) voluminous documentary evidence presented by Farmer in support of her opposition to summary judgment indicates that the breakdowns were not completely bereft of relevant information; nearly all contained at least some coherent categorization of the type and quantity of the allegedly necessary materials. Although the jury could find that defendants were negligent in failing to demand a more thorough breakdown and that the breakdowns that defendants accepted may not have complied with all applicable rules and regulations, it is significant that the documents were not totally barren in this regard. No reasonable jury could find the knowledge requirement met based on this evidence alone.

Similar thinking would drive the jury's assessment of the fact that many reimbursement requests were for the exact maximum monetary value permissible under the EHRP. At first blush, that evidence might lead one to conclude that defendants were recklessly rubber-stamping whatever the third-party contractors submitted. But the jury also would consider the realities of the construction industry, especially for those involved in projects like the EHRP with specific cost ceilings.

If a program permits only projects with a value of up to $20,000, a third-party contractor who believes that the reasonable value of a project is, for example, $22,000 might – under the theory that a bird in the

hand is worth two in the bush – bid and receive reimbursements for $20,000, even though that would mean perhaps not making as much as the market would ordinarily bear on a like project. But instead of harming the national treasury, such a practice would allow the government to maximize the value it receives, while permitting legitimate third-party contractors to be awarded projects they would not otherwise be eligible to receive. The jury would thus expect a disproportionate number of reimbursements to be for the exact amount of the regulatory maximum.

It is possible that a dishonest third-party contractor would inflate its numbers to reach the maximum, just as an honest one would deflate its numbers. Defendants, therefore, may have been negligent in failing to investigate adequately, but the mere fact that many reimbursements were for the maximum value is insufficient evidence from which the jury could find defendants liable under the FCA.

D.

When weighing Farmer's argument that in many cases it does not appear that competitive bidding occurred, that a HUD official stated that such bids should have taken place, and that the Texas Government Code arguably requires competitive bidding for these third-party contracts, the jury would necessarily assess how obvious it should have been to defendants that they were violating the regulations: the

more obvious the violation, the more rational the inference that defendants were acting knowingly. Here, however, the violation is not obvious at all.

As support for her claim that bidding regulations were violated, Farmer argued in her opposition to summary judgment that Texas Government Code § 2155.063 mandates competitive bidding. R. 2452-54. That point was not addressed by defendants, but it is far from certain that Farmer's interpretation of the Code is correct.

First, the Code states that "a purchase of or contract for goods or services shall, whenever possible, be accomplished through competitive bidding." § 2155.063. Thus, on its face this section is somewhat ambiguous, because it includes the limiting phrase "whenever possible." The presence of this ambiguity makes it less likely that the jury would conclude that a violation – if, indeed, there was one – of the provision means that defendants acted with reckless disregard for the truth, especially given the limited caselaw interpreting the provision.[13]

Second, and of more significance, it is also uncertain on its face whether that provision of the Code applies to contracts by a non-governmental organization, like HAUL, with third-party contractors, or if it

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[13] We know of only one case that even mentions this section of the Code, *Tsumi, Inc. v. Tex. Parks & Wildlife Dep't*, 23 S.W.3d 58 (Tex. App. – Austin 2000, pet. denied), and that case is not on point.

applies only to contracts by the government itself. Even if it does apply to non-governmental contracts that are paid with public money, defendants could have believed, perhaps negligently, that it did not apply to contracts like those at issue here. Given this uncertainty, and given that HUD's requirement of competitive bidding is tied to Texas's standard,[14] the jury would find that any failure by defendants to comply with a bidding requirement is at most evidence of negligence.

E.

Finally, the jury would necessarily consider the proffered evidence as a whole. Given that, in context, all the other evidence mustered by Farmer to support knowledge of falsity is of limited probative value – certainly insufficient for a reasonable jury to find culpability greater than negligence – the jury would have to consider whether the evidence of missing bids, coupled with the cumulative effect of the other evidence, might be enough to find that defendants had one of the requisite mental states. Though the combined persuasive force of these individual pieces of evidence is more compelling than any in isolation, the jury could not find liability under these facts,

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[14] *See* 24 C.F.R. § 85.36(b)(1) ("Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.").

because of the FCA's onerous *mens rea* requirement of, at a minimum, reckless indifference.

V.

For the reasons set forth in the district court's opinion, we agree that Farmer's claim that defendants have violated § 3729(a)(3) is similarly lacking in specific evidence sufficient to withstand summary judgment. By the words of that subsection, a person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid" is subject to FCA liability. To prove a conspiracy, Farmer ultimately must be able to show (1) the existence of an unlawful agreement between defendants to get a false or fraudulent claim allowed or paid by HUD and (2) at least one act performed in furtherance of that agreement. *See United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487, 509 (S.D. Tex. 2003). As part of that showing, Farmer must demonstrate that defendants "shared a specific intent to defraud the [G]overnment." *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 274 F. Supp. 2d 824, 857 (S.D. Tex. 2003) (quotation and citation omitted). As with § 3729(a)(2), negligence alone cannot satisfy § 3729(a)(3).

For purposes of summary judgment, Farmer must show specific evidence that would allow a reasonable jury to find that these conditions have been met; this she cannot do. The evidence she has presented to support a conspiracy is that, as stated in

her opening brief on appeal, "documentary evidence established that [defendants] jointly signed and submitted claims for payment that contained false and fraudulent information." She also notes that "[i]n some cases claims that were signed by both City and HAUL had been notarized but not signed by the contractors. In other cases, the jointly submitted Request's [*sic*] for Payment were blank where the amounts were to have been shown." At the same time, Farmer contends that "[t]here is no indication . . . that . . . the City question[ed] or raise[d] any objection to any information submitted by HAUL on which the requests for payment were based." From this, she claims that "at least an inference of tacit agreement" has been raised.

That is not enough to raise an inference of even a tacit agreement. That both defendants signed certain forms in arguably suspicious circumstances does not demonstrate – or even reasonably intimate – a shared unlawful objective to obtain payment on false claims. To conclude otherwise requires this court to accept that a reasonable jury could infer that, when they signed the forms, *both* defendants were actually aware of the suspicious circumstances and were not merely negligent.

From that inference, a reasonable jury then would have to infer that *both* defendants were, in fact, conscious of the false claims, not just the suspicious circumstances. But even those two inferences would not be enough. The reasonable jury would then have to infer from that consciousness that *both* defendants

had agreed – at least tacitly – on a plan to defraud the government.

Even viewing the proffered evidence in the light most favorable to Farmer, we cannot accept that any reasonable jury could find that the mere existence of joint signatures and arguably suspicious circumstances is enough to bear the heavy burden Farmer wishes it to support. We thus agree with the district court that the fact that the city signed and approved HAUL's requests for payment does not establish any kind of agreement between the city and HAUL to commit fraud, nor does it show any specific intent to defraud the United States.

And, again as correctly observed by the district court, the fact that the city may have accepted improper documentation from HAUL does not establish that defendants agreed to engage in fraudulent conduct. Viewed again in the light most favorable to Farmer, this evidence suggests, at best, that defendants negligently administered their respective duties under the EHRP. Negligence, however, is not conspiracy. Defendants are entitled to summary judgment on Farmer's § 3729(a)(3) claim.[15]

In summary, because Farmer has failed to produce specific evidence from which a reasonable jury

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[15] Because we decide the § 3729(a)(3) claim based on insufficient evidence, we need not consider whether the absence of liability under § 3729(a)(2) requires a finding of no conspiracy under § 3729(a)(3).

could find that defendants acted with knowledge of falsity in any relevant document or that there was a conspiracy between defendants, the summary judgment is AFFIRMED.

EDITH H. JONES, Chief Judge, concurring in part and dissenting in part:

For procedural and substantive reasons, I respectfully dissent from the majority's holding on Farmer's § 3729(a)(2) claim.[1] The parties argued this claim primarily (and before this court, exclusively) in terms of whether § 3729(a)(2) implies a presentment requirement. The majority bypasses both the original source and presentment issues and instead affirms summary judgment based on an undeveloped argument that there was no "knowing" misuse of federal funds in this case. Though the majority fails to make this clear, only one of the defendants raised this "scienter" issue below, the district court did not rule on it and neither defendant has argued it to this court. The scienter issue has not been sufficiently preserved, or the record adequately developed, to justify the majority's decision on this point. Worse still, the evidence of record strongly suggests that someone treated the federal repair funds as a honey pot rather than a public trust. Yet the majority goes

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[1] I concur in the majority's judgment as to Farmer's conspiracy claim under § 3729(a)(3). Farmer has not produced sufficient evidence showing that both defendants agreed on a plan to defraud the government.

out of its way to minimize palpably suspicious circumstances.

1. The majority's assertion that we "may affirm the district court's judgment on any grounds supported by the record" is an oversimplification of the rule. Both the nature of appellate review and this circuit's precedent require a more cautious approach. As this court explained *en banc* in *United States v. Brace*, "we are a court of review, not of original error. . . . we do not craft new issues or otherwise search for them in the record." 145 F.3d 247, 255-56 (5th Cir. 1998). Rather, "[i]t is for the parties, those who have a stake in the litigation, to decide which issues they want to pursue at trial and on appeal." *Id.* at 256.

The defendants in this case decided how best to carry their respective burdens in pursuit of summary judgment and success on appeal, but it turns out those tactical decisions are of little consequence. The majority affirms summary judgment for both defendants on grounds that the City never raised at any stage, and neither defendant pursued before this Court.[2] HAUL did raise the issue below, but prevailed on the presentment issue and chose to place all its eggs in the same basket on appeal. To affirm summary judgment for HAUL on grounds that it has

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[2] The majority's representation that "defendants – primarily HAUL – argued" the lack of scienter below is simply incorrect. One defendant, HAUL, raised this issue below. The City never did.

abandoned may be justifiable in theory, but to extend that benefit to the City is nothing short of a windfall, a *sua sponte* summary judgment on appeal.

Generally, this court may affirm summary judgment on grounds not relied on by the district court. But this is not a complete statement of the rule; in most cases we require, at a minimum, that those grounds be raised before the district court. *Leverette v. Louisville Ladder Co.*, 183 F.3d 339, 342 (5th Cir. 1999) ("This Court will not consider an issue that a party fails to raise in the district court absent extraordinary circumstances.").[3] As Judge Garwood carefully explained in *FDIC v. Laguarta*:

> This Court has clearly held, however, that it will generally not consider a new ground on appeal raised by an appellant in opposition to summary judgment. The same should apply to new grounds raised by an appellee in defense of summary judgment where the parties were not afforded an opportunity to develop the issue below, and it was not implicit or included in the issues or evidence tendered below, so that the party was not on

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[3] Even in opinions that recite the majority's abbreviated version of this rule, there is the implication that the district court at least had the *opportunity* to pass judgment on the issue. *See, e.g., Mangaroo v. Nelson*, 864 F.2d 1202, 1204 n.2 (5th Cir. 1989) (Smith, J.) (stating that the court may affirm for any grounds in the record, "even if those grounds were rejected by the trial court"); *Hoyt R. Matise Co. v. Zurn*, 754 F.2d 560, 566 (5th Cir. 1985) (stating that the court may affirm on any ground, "including one rejected or ignored in the lower court").

> notice of the need to meet it, and the record appears not to be adequately developed in that respect.

939 F.2d 1231, 1240 (5th Cir. 1991) (internal citations omitted). As Judge Garwood acknowledged, there may be exceptions to this rule, "if the issues were implicit or included in those raised below or the evidence in support thereof, or if the record appears to be adequately developed in respect thereto." *Id.* This recognized exception was properly invoked by the court in *FDIC v. Lee,* 130 F.3d 1139, 1142 (5th Cir. 1997). *Lee,* after a thorough analysis, affirmed summary judgment on a purely legal ground that was raised in the Complaint, was uncomplicated, and had been completely developed for appellate review. *Id.* at 1142-43.

This case is not like *Lee*: first, the "knowingness" issue has not been fully developed and is not amenable to simple resolution on appeal. The parties spent no time arguing scienter to this Court, and as demonstrated *infra,* the majority's unassisted review of a cold record is woefully incomplete. The City, having failed to put Farmer on notice that it was attacking the scienter element of her claim, is simply not entitled to summary judgment on the issue. Nor am I persuaded that a judgment in favor of HAUL on reckless disregard exonerates the City with regard to its own responsibilities in administering the EHRP. The City – which should bear the burden on its own motion for summary judgment – chose not to raise the issue. Yet the majority, without explaining what

authority it has to do so, simply "cuts the City in" on HAUL's victory.[4]

Further, unlike *Lee*'s purely legal question of statutory construction, the scienter finding in this case turns on a morass of factual distinctions that – as the majority's "on-the-one-hand, on-the-other-hand" analysis demonstrates – are far from clear-cut. Perhaps this sprawling factual determination is an exception to the rule that we limit ourselves to the issues the parties have raised on appeal. But the majority's failure properly to articulate that rule, much less explain how an exception applies, serves only to confuse the law. This decision does not do justice to the governing legal standard or to the parties before this court.

2. In addition to these procedural objections, I dissent from the majority's substantive resolution of the scienter question. To resolve this fact issue as a matter of law, a court must reach a conclusion that is beyond dispute by all reasonable jurors. The majority falls short of this standard with its protracted and unusual – yet ostensibly inescapable – weighing and

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[4] This is even more unexpected in light of the City's argument in its motion to dismiss that Farmer was not an "original source" because HUD was already "squarely on the 'trail of fraud' against [HAUL]." The City never argued this wrongdoing would have been difficult to detect; rather, it submitted evidence showing the "very same types of fraud" Farmer identified were readily apparent to the HUD inspectors who were looking into the EHRP.

re-weighing of a laundry list of suspicious transactions that HAUL and the City approved. The majority's account of what a jury would "expect" to find in the evidence, or what sort of "thinking would drive the jury's assessment" is not only unpersuasive, but highlights that the majority is performing its own fact-finding. The majority also tips its hand with a lengthy prognostication as to what facts a jury "would put little weight on," or what a jury would be "less likely to infer" or "less likely to conclude." I have never seen an appellate opinion that purported to resolve a factual question like this, on a record which raises so many questions, in a patently "juri-fied" way. I cannot agree that *all* reasonable jurors would have no choice but to follow the majority's serpentine course through the evidence and reach its conclusion.

My disagreement is sharpened by the majority's gross understatement of the evidence Farmer presented on summary judgment. HUD did not simply conclude, as the majority states, that "many" third party contracts lacked an acceptable cost breakdown. Rather, the HUD inspector chose 62 files at random and found that "*none* of the contracts contained an acceptable cost breakdown." R. 1753, 1788 (emphasis added). The majority makes it look as if there were problems in only a handful of cases – all with reasonable, legitimate explanations. To the contrary, the evidence indicates that, program-wide, the EHRP was unsupervised, rife with fraud, and effectively unreviewable due to an obvious lack of fundamental documentation. Based on 62 sample files and 26

on-site visits, HUD made the following observations that the majority chooses to overlook:

- "Across the board," the work write-ups were "too general and loosely written to allow a reviewer to conclude that equipment and/or materials are acceptable, quantities are accurate, and costs are reasonable." R. 1788.
- "*None* of the files reviewed contained a Scope of Work to describe what was to be done and how it would be done. . . . This information is critical in estimating costs." R. 1788 (emphasis added).
- "Change orders" – alterations to a bid after a contract was signed – did not show justification for the changes. R. 1788.
- *None* of the files contained state-required forms for termite inspection and treatment, even though this was listed as a cost item. R. 1788.
- "*All* files" contained too many stand-alone and lump sum estimates without a reasonable explanation. "*None* of the contracts contained an acceptable cost breakdown. . . . it appears that contractors were just assigning prices to accommodate the amount of the grant." R. 1788 (emphasis added).
- "Across the board," on-site visits revealed "huge differences" between the estimates of materials needed and the actual materials applied, as well as "obvious evidence of poor on-site supervision and inspections." R. 1789.

- On-site visits verified that "on numerous occasions contractors collected payments for units of materials that were not applied." R. 1789.
- There was "*no evidence* that the contractors made any attempt to adjust costs to correct excessive estimates." R. 1789 (emphasis added).
- In light of these conspicuous overcharges, the HUD inspector observed that "there is *no evidence* that the subrecipients managing the program or the City of Houston questioned the contractors' actions and overpayments – *they failed to exercise any quality control.*" R. 1789 (emphasis added).

This is only a sample. Farmer submitted over 500 pages of exhibits including reports, documents, and photographs that depict blatant misrepresentations and obviously substandard work. On two occasions it appears EHRP funds were used to make down payments on newly-constructed homes – an admittedly impermissible expenditure. The City denies this took place (R. 2303, 2306), but the record contains a check to Habitat for Humanity in the amount of $20,000 (R. 1941); a $20,000 invoice from Habitat for Humanity reading "downpayment assistance for a home" (R. 1943); a request for payment detailing another $15,000 check to Habitat for Humanity (R. 2017); and a note from a City inspector on this second property that reads "Upon review of the file it was noticed that the homeowner received $15,000 in down payment. . . ." R. 2276. Farmer also presented evidence that $6,700 in program funds were spent to fill in a

swimming pool – another facially impermissible expenditure that the City denies. (R. 2304). Yet the record contains a request for payment to "ABC Drainage" in this amount (R. 2110), and the City's re-inspection report (the very basis for its denial) details this expense as "swimming pool fill-in." R. 2279.

In light of the evidence in the record, the majority's analysis is not only unwieldy, it is untenable. The record belies the majority's assertion that it would have been "relatively difficult" for the defendants to recognize these overcharges. Rather, the evidence suggests the defendants may have turned a blind eye to patently false submissions, and, at best, "failed to exercise any quality control at all." As more than one court has noted, the FCA reckless disregard standard "is intended to reach the 'ostrich-with-its-head-in-the-sand' problem where government contractors hide behind the fact that they were not personally aware that such overcharges may have occurred."[5]

If the majority is holding out for a "smoking gun" admission of fraudulent intent, this would vitiate the statute's provision that "no proof of specific intent to defraud is required." 31 U.S.C. § 3729(b). At a minimum, the FCA requires reckless disregard of truth or

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[5] *United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997) (quoting 132 Cong. Rec. H9382-03 (daily ed. Oct. 7, 1986) (statement of Rep. Berman)); *see also UMC Elecs. Co. v. United States*, 43 Fed. Cl. 776, 794 (1999) (similar).

falsity. As noted in one opinion cited by the majority, "failure to make a minimal examination of records constitutes deliberate ignorance or reckless disregard." *UMC Elecs. Co. v. United States*, 43 Fed. Cl. 776, 794 (1999) ("It is apparent that this reckless disregard standard prevents defendants from simply pointing to confusion over invoices and billing records as a complete defense."). There is enough in this record to allow a jury to determine whether something worse than gross negligence led the City and HAUL to approve so many obviously improper expenditures. There is certainly much more in the record than the majority has accounted for. Given the evidence of clear and pervasive fraud in this case, the majority's finding that the defendants cannot be found culpable of anything worse than "mismanagement" is hardly credible, much less beyond reasonable debate.

I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA, Ex rel. MARSHA FARMER,	§	**Civil Action**
Plaintiffs,	§	**No. H-03-3713**
v.	§	
CITY OF HOUSTON and HOUSTON AREA URBAN LEAGUE,	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending before the Court are Defendant City of Houston's Motion to Dismiss (Doc. #22) and Defendant Houston Area Urban League's Motion to Dismiss (Doc. #27). For the following reasons, the two Motions are **GRANTED IN PART** and **DENIED IN PART**.

I. BACKGROUND

Relator Marsha Farmer ("Relator") brings this action on behalf of the United States of America against Defendants City of Houston ("the City") and Houston Area Urban League ("HAUL") (collectively, "Defendants") for violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq.

Relator asserts that she applied for assistance under the City's Emergency Home Repair Program

("the Program") after her roof failed during Tropical Storm Allison. The Program is funded by the United States through the Department of Housing and Urban Development ("HUD") under a Grant Agreement between the City and the United States. Under the Grant Agreement, the City authorized and approved a grant allocation for the Program, and selected HAUL, a non-profit corporation, to implement a portion of the Program.

Relator alleges that, after initially qualifying for the Program,[1] HAUL inspected her property and sent her a write-up outlining the repairs to be made and the quantity and type of materials to be used. Relator noticed several incorrect quantities on the write-up, most notably, that HAUL listed 4,000 square feet of roofing material, when Relator knew that only 2,000 square feet of roofing material was needed the last time she had the roof replaced.

Relator then utilized the Texas Public Information Act to investigate other repairs made by HAUL under the Program. She inspected the City's disbursements to HAUL under the Program from November 1999 through February 2003, and compared them with estimates of roof size, based on the square footage of the repaired houses, which she obtained from the Harris County Appraisal District. Relator

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[1] The City alleges that Relator did not ultimately qualify for the Program. No work was actually performed on Relator's house by HAUL.

determined that the Program was paying for excessive roofing materials that were never used. Relator utilized this method of comparison to determine that the Program was paying for excessive charges in other areas as well.

As a result of her investigation, Relator alleges that Defendants made false claims in Request for Payment forms ("RFPs"), which were based on excessive materials supposedly used for roofs, gutters, foundations, water lines, utility lines, windows, smoke detectors, base cabinets, and counter tops. She also alleges that federal funds were wrongfully used for down payments on two houses; for removal of a swimming pool; and to pay invoices that were in excess of supporting bids, unaccompanied by change orders. The specific allegations refer to seventy-two projects and disbursements, totalling in excess of $140,000.

Relator provided a statement of all material evidence and information related to her complaint to the Attorney General of the United States and to the United States Attorney for the Southern District of Texas. She then filed her complaint under seal on behalf of the United States, alleging that Defendants filed false claims; conspired to file false claims; and failed to comply generally with the Program requirements. Plaintiff also asserted a claim for money had and received. The Government elected not to intervene, and the complaint was unsealed. Defendants each filed a Motion to Dismiss. The Motions will be

considered together because the arguments for dismissal overlap in large part.

Defendants collectively argue that Relator's claims should be dismissed because: (1) Relator has not met the specificity requirements of Federal Rule of Civil Procedure 9(b) ("Rule 9(b)"); (2) jurisdiction is barred by 31 U.S.C. § 3730(e)(4); (3) she does not have standing to assert a claim for money had and received; and (4) she does not have standing to assert a claim for Defendants' failure to comply generally with program requirements. Relator concedes that she does not have standing to bring either a claim of money had and received, or a claim for Defendants' failure to comply generally with program requirements, therefore these claims are **DISMISSED**.

II. PLEADING FRAUD WITH PARTICULARITY

Claims brought under the FCA must comply with the particularity requirements of Rule 9(b). *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997). A motion to dismiss for failure to plead fraud with particularity under Rule 9(b) is treated as a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Id.* at 901. A district court will dismiss a complaint under Rule 12(b)(6) only if "it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994). When considering a Rule 12(b)(6) motion to

dismiss, a court must "accept the complaint's well-pleaded facts as true and view them in the light most favorable to the plaintiff." *Johnson v. Johnson,* 385 F.3d 503, 529 (5th Cir. 2004).

Rule 9(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed. R. Civ. P. 9(b). In a complaint alleging violation of the FCA, pleading fraud with particularity requires a plaintiff to set forth the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what that person obtained thereby." *United States ex rel. Doe v. Dow Chem. Co.,* 343 F.3d 325, 329 (5th Cir. 2003). Rule 9(b) is to be harmonized with the general principles of Rule 8, which requires only that a complaint give the defendant fair notice of what the claim is and the grounds upon which it rests. *See* Wright & Miller Federal Practice and Procedure: Civil 3d § 1298.

Having reviewed the Amended Complaint, the Court finds and holds that the allegations satisfy the requirements of Rule 9(b) and are sufficient to inform Defendants of Relator's claims of fraud. Relator alleges that HAUL submitted false claims for reimbursement to the City, which the City paid using federal funds. Relator provides numerous specific examples of overcharging, each of which includes the date, the project location, and the estimated amount of excessive charges made by HAUL. Relator also

points to an RFP from HAUL to the City, that is dated and signed by representatives of HAUL and the City, which certifies that the money requested and received was used solely on projects under the Program. Relator asserts that this constitutes a false claim because the RFP is based on excessive charges.

Defendants argue that since an RFP is a claim submitted by HAUL to the City, and not a claim submitted by the City to the federal government, Relator has failed to demonstrate a false claim for payment to the federal government. The City additionally argues that because an RFP is made by HAUL, there is no evidence that the City made a false representation. These arguments fail.

In *United States ex rel. Riley v. St. Luke's Episcopal Hospital,* the Fifth Circuit held:

> The FCA applies to anyone who knowingly assists in causing the government to pay claims grounded in fraud, without regard to whether that person has direct contractual relations with the government. Thus, a person need not be the one who actually submitted the claim forms in order to be liable.

355 F.3d 370, 378 (5th Cir. 2004) (citations and quotations omitted). Even though an RFP is submitted by HAUL to the City, the City uses federal funds to pay an RFP, therefore a request under the Program to be paid by the City is a request to be paid by federal funds, and payment by the City is payment by the

federal government. Moreover, an RFP demonstrates that the City paid HAUL's fraudulent claims. Relator alleges that the City paid the claims with federal funds, knowing the claims were false; therefore, she has properly alleged that Defendants made, and conspired to make, false claims in violation of the FCA.

III. PUBLIC DISCLOSURE BAR

Defendants argue that the Court lacks jurisdiction over Relator's claims because of the FCA's "public disclosure bar." *See* 31 U.S.C. § 3730(e)(4)(A). Though this argument is raised in Defendants' Motions to Dismiss, the Court properly treats this argument under a motion for summary judgment standard because a "challenge under the FCA jurisdictional bar is necessarily intertwined with the merits." *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 384 F.3d 168, 173 (5th Cir. 2004) (quotation omitted).

A. Summary Judgment Standard

A motion for summary judgment under Federal Rule of Civil Procedure 56 requires the Court to determine whether the moving party is entitled to judgment as a matter of law, based on the evidence thus far presented. *See* Fed. R. Civ. P. 56(c). "Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett,* 247 F.3d 206, 210 (5th Cir. 2001) (citations and quotations omitted). Evidence is construed in the light most favorable to the non-moving party. *Id.*

Defendants argue that Relator's claims are barred under the "public disclosure" provision, which states:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). This requires the Court to consider three questions: "(1) whether there has been a 'public disclosure' of allegations or transactions, (2) whether the qui tam action is 'based upon' such publicly disclosed allegations, and (3) if so, whether the relator is the 'original source' of the information." *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Serv. Co.,* 336 F.3d 346, 352 (5th Cir. 2003).

B. "Based Upon" a Public Disclosure

Defendants argue that there has been a public disclosure because some of the information Relator used to discover the alleged fraud was obtained under the Texas Public Information Act ("TPIA"). The Fifth Circuit has held that a response to a Freedom of Information Act ("FOIA") request "is an administrative report constituting a public disclosure under § 3730(e)(4)(A)." *Reagan,* 384 F.3d at 176. The TPIA is the state counterpart of the federal FOIA, therefore a response to the TPIA must also be regarded as a public disclosure under § 3730(e)(4)(A).[2]

The next question is whether this action is based upon the publicly disclosed allegations. "An FCA qui tam action even partly based upon public allegations or transactions is nonetheless 'based upon' such allegations or transactions." *Id.* (citation and quotation omitted). Plaintiff does not dispute that this action is based largely on the responses she received

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[2] Some circuits make a distinction between qui tam suits based on "publicly disclosed information" and those based on "publicly disclosed allegations or transactions;" allowing the former to proceed while barring the latter. *United States ex rel. Springfield Terminal Ry. v. Quinn,* 14 F.3d 645, 653 (D.C. Cir. 1994). If the Fifth Circuit made this distinction, Relator's argument would be much simpler, since the gist of her position is that she relied in large part on publicly disclosed information, not publicly disclosed allegations, to assert a claim of fraud against Defendants. The Fifth Circuit has not made this distinction, however, so the Court is bound by the Fifth Circuit's interpretation that FOIA requests are "public disclosures" for purposes of § 3730(e)(4)(A).

from her TPIA requests, which qualify as public disclosures.

C. Original Source Exception

Because there has been a public disclosure and this case is based upon those disclosures, the Court does not have jurisdiction under § 3730(e)(4) unless Relator is the original source of the information. *Id.* An original source is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

To come under the original source exception, Relator must satisfy a two-part test: (1) she must demonstrate that she has direct and independent knowledge of the information on which the allegations are based, and (2) she must demonstrate that she has voluntarily provided the information to the Government before filing her qui tam action. *Reagan,* 384 F.3d at 177. Only the first part of the test is at issue here because there is no question that Relator provided the information to the Government before filing this action.

The "direct and independent" standard does not require Relator to have direct and independent knowledge of each false claim alleged in her complaint. *Id.* Relator "is simply required to possess direct and independent knowledge of the 'information

on which the publicly disclosed allegations are based.'" *Id.* (quoting *Laird,* 336 F.3d at 355). Relator's knowledge is direct if it was "gained by [her] own efforts rather than learned second-hand through the efforts of others." *Laird,* 336 F.3d at 355 (citation omitted). Relator's "knowledge is considered 'independent' if it is not derived from the public disclosure." *Reagan,* 384 F.3d at 177.

Defendants argue that Relator's knowledge is neither direct nor independent because it is based almost entirely on public information. Although heavily based on public information, Relator's knowledge that Defendant engaged in fraud is direct and independent because it was gathered through her own efforts. Relator investigated and compared the City's disbursements to HAUL under the Program, with her estimates of costs based on records of the square footage of the houses that were repaired. Through these efforts, Relator determined that Defendants were inflating the quantity of materials needed to repair the houses and receiving payments for these excessive materials. Relator's own investigation demonstrated a new and undisclosed relationship between disclosed facts and put HUD "on the trail" of fraud. *See id.* at 179 ("[T]he investigation or experience of the relator either must translate into some additional compelling fact, or must demonstrate a new and undisclosed relationship between disclosed facts, that puts a government agency 'on the trail' of fraud, where that fraud might otherwise go unnoticed.").

Aside from the fact that Relator uncovered something new from the public information, her entire investigation began as a result of her independent knowledge that HAUL overestimated materials to repair her roof. Even if Relator did not ultimately qualify for the Program, HAUL was sent to Relator's house to estimate the cost of repairing her roof under the Program. Because she had her roof repaired in the past, Relator knew how much material was necessary to repair her roof and recognized that HAUL's assessment of her house grossly exceeded the amount of materials needed. Relator's subsequent request for public records and investigation of other claims submitted by HAUL would never have begun if she had not first discovered that HAUL claimed excessive materials to repair her own roof.

Relator's investigation unearthed important information about fraudulent claims. Although the Program has been audited in the past, prior to Relator's efforts, there has never been an examination of HAUL's alleged overcharging practice, which is now under scrutiny. Because this review resulted from Relator's efforts, she is the original source of the information underlying her claims. The Court therefore has jurisdiction over the claims under 31 U.S.C. § 3730(e)(4).

IV. CONCLUSION

Defendants' Motions to Dismiss (Doc. #22 and Doc. #27) are **GRANTED IN PART** and **DENIED**

IN PART. Relator lacks standing to bring a claim of money had and received, and a claim for Defendants' failure to comply generally with program requirements, therefore these claims are **DISMISSED**. However, Relator has adequately alleged that Defendants made, and conspired to make, false claims in violation of the FCA, and is the original source of the information underlying her claims. Defendants' arguments to dismiss under Rule 9(b) and 31 U.S.C. § 3730(e) therefore fail.

IT IS SO ORDERED.

SIGNED this 5th day of May, 2005.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES
DISTRICT JUDGE

TO INSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN SENT ONE BY THE COURT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, *et al*,	§	
Plaintiffs,	§	**CIVIL ACTION NO. H-03-03713**
v.	§	
CITY OF HOUSTON, *et al*,	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending before the Court are Defendant City of Houston's Motion for Summary Judgment (Doc. # 93), Defendant Houston Area Urban League's Motion for Summary Judgment (Doc. # 94), and Defendant City of Houston's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. # 92). For the reasons set forth below, the motions for summary judgment are **GRANTED**, and the motion to dismiss is **DENIED AS MOOT**.

I. BACKGROUND

Relator Marsha Farmer ("Relator") brings this action on behalf of the United States of America against Defendants City of Houston ("the City") and Houston Area Urban League ("HAUL") (collectively, "Defendants") for violations of the False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq. Relator's allegations pertain to the City's Emergency Home Repair

Program ("EHRP"), which is funded by the United States Department of Housing and Urban Development ("HUD"). Under a grant agreement with HUD, the City authorized and approved a grant allocation for the EHRP and selected HAUL, a non-profit corporation, to implement a portion of the program. The City administered and maintained the EHRP, using HUD grant funds from a line of credit that HUD had previously established for that purpose. The City's expenditures on the EHRP were subject to later audit by HUD.

Relator asserts that she applied for assistance under the EHRP after her roof failed during Tropical Storm Allison. She alleges that, after she initially qualified for the program,[1] HAUL inspected her property and sent her a write-up outlining the repairs to be made and the quantity and type of materials to be used. Relator states that she noticed several incorrect quantities on the write-up, most notably, that HAUL listed 4,000 square feet of roofing material, when Relator knew that only 2,000 square feet of roofing material was needed the last time she had the roof replaced. Relator then utilized the Texas Public Information Act to investigate other repairs made by HAUL under the EHRP. She inspected the City's disbursements to HAUL under the program from November 1999 through February 2003, and

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[1] Relator did not ultimately qualify for the EHRP, and no work was actually performed on her house by HAUL.

compared them with estimates of roof size, based on the square footage of the repaired houses, which she obtained from the Harris County Appraisal District, Relator determined that the EHRP was paying for "excessive roofing materials that were never used. Relator utilized this method of comparison to determine that the program was paying for excessive charges in other areas as well, including gutters, foundations, water lines, utility lines, windows, smoke detectors, base cabinets, and counter tops.

As a result of her investigation, Relator alleges that Defendants made false claims in request for payment forms and other supporting documents, which were submitted by HAUL to the City, and subsequently approved and paid by the City, using HUD grant funds. Relator's specific allegations refer to seventy-two projects and disbursements under the EHRP. On September 12, 2003, after providing notice to the Attorney General of the United States and to the United States Attorney for the Southern District of Texas, Relator filed her complaint under seal on behalf of the United States, alleging that Defendants filed false claims, conspired to file false claims, and failed to comply generally with the EHRP requirements. Relator also asserted a claim for money had and received. After the United States Government ("Government") elected not to intervene, Relator filed an amended complaint on August 18, 2004, and Defendants each filed a motion to dismiss. The Court granted these motions in part, dismissing Relator's claims against Defendants for money had and

received and for their alleged failure to comply with program requirements.

Defendants have now moved for summary judgment on Relator's claims, and the City has moved to dismiss the claims for lack of subject matter jurisdiction. In response to Defendants' motions for summary judgment Relator has clarified that she is pursuing claims under 31 U.S.C. § 3729(a)(2) and (a)(3) only. Accordingly, Defendants' motions for summary judgment as to potential causes of action under any other sections of the False Claims Act, including 31 U.S.C. § 3729(a)(1), (a)(4), (a)(5), (a)(6), and (a)(7) are **GRANTED**.

With respect to Relator's claim under 31 U.S.C. § 3729(a)(2), Defendants urge that summary judgment is appropriate because Relator cannot show that either the City or HAUL presented a claim for payment or approval to the Government. Defendants contend further that summary judgment on Relator's 31 U.S.C. § 3729(a)(3) claim is warranted, because she has not presented any evidence that Defendants knowingly agreed to defraud the Government, as required to demonstrate a conspiracy. Relator argues, on the contrary, that presentment of a claim to the Government is not a necessary element of a claim under 31 U.S.C. § 3729(a)(2), and that Defendants' filings under the EHRP were subject to Government approval by virtue of HUD's auditing power. Relator argues that a conspiracy under 31 U.S.C. § 3729(a)(3) is evidenced by the signatures of City personnel on reimbursement forms submitted by HAUL to the

City. The Court held a hearing on Defendants' motions on July 27, 2006. Having considered the parties' briefs and oral arguments, the Court finds that summary judgment for Defendants is appropriate. Because the Court **GRANTS** Defendants' motions for summary judgment, the motion to dismiss is **DENIED AS MOOT**.

II. ANALYSIS

A. Summary Judgment Standard

A motion for summary judgment under Federal Rule of Civil Procedure 56 requires the Court to determine whether the moving party is entitled to judgment as a matter of law, based on the evidence thus far presented. *See* Fed. R. Civ. P. 56(c). "Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett,* 247 F.3d 206, 210 (5th Cir. 2001) (quotations omitted). A genuine issue of material facts exists if a reasonable jury could enter a verdict for the nonmoving party. *Crawford v. Formosa Plastics Corp.,* 234 F.3d 899, 902 (5th Cir. 2000). The Court views all evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *Id.*

"[A] complete failure of proof concerning an essential element of the nonmoving party's case

necessarily renders all other facts immaterial" and "mandates the entry of summary judgment" for the moving party. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986). If the moving party shows that there is a lack of evidence to support the nonmoving party's claims, the nonmoving party "must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Kee,* 247 F.3d at 210 (quotation omitted). The nonmovant cannot satisfy this burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (per curiam).

B. Claim Under 31 U.S.C. § 3729(a)(2)

1. Requirement of Presentment to the Government

31 U.S.C. § 3729(a)(2) creates liability for any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government." 31 U.S.C. § 3729(a)(2); *see also United States ex rel. Riley v. St. Luke's Episcopal Hosp.,* 355 F.3d 370, 376 (5th Cir. 2004). Defendants assert that, in order for liability to arise under section 3729(a)(2), a claim must actually be presented to the Government for payment or approval. To put it another way, Defendants assert that the mere payment of a claim by a recipient of federal funding will not give rise to section 3729(a)(2) liability, absent evidence that the claim has been presented to the Government. As

authority for this argument, Defendants cite the D.C. Circuit's opinion in *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004). In *Totten,* the court affirmed the dismissal of a relator's claim under 31 U.S.C. § 3729(a)(1) because no claim had been presented to an officer or employee of the Government. *Id.* at 490. The court went on to find that the requirement that a claim must be presented to the Government applies with equal force to section 3729(a)(2). *Id.* at 498.

First, the court recognized that section 3729(c) defines a "claim" to include requests made to grantees and other recipients "if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse [the recipient] for any portion of the money or property." *Id.* (citing 31 U.S.C. § 3729(c)). In light of this broad definition of a "claim," the court found that reading section 3729(a)(2) to *not* require the presentment of a claim to the Government would render the words "by the Government" in (a)(2) meaningless. *Id.* at 498-99. If Congress intended for liability to attach under section 3729(a)(2) simply by making or using a false record to get a claim paid by a recipient of federal funding, then the reference to false records or statements made "to get a false or fraudulent claim paid or approved" would have been sufficient without the additional requirement that the claim be paid or approved "by the Government." *Id.* The court thus concluded that, when Congress simultaneously added the words "by

the Government" to section 3729(a)(2) and created section 3729(c), in a 1986 amendment to the False Claims Act, the intended effect was "fairly obvious: Congress was referring back to the presentment requirement of Section 3729(a)(1)." *Id.* at 499.

The court then turned to the parallel structure of sections 3729(a)(1) and (a)(2), noting that, prior to an amendment in 1982, the liability provisions of the False Claims Act were combined into one sentence.[2] *Id.* at 499-500. In revising the False Claims Act, Congress made clear that it intended no substantive change in the law, but rather, to remedy awkwardness and obsolete terms. *Id.* at 500. The court found that, "[t]he present Section 3729(a)(2), therefore, is the direct descendant of a clause that could only be

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[2] Prior to its 1982 revision, the False Claims Act's liability provision read as follows:

> Any person . . . who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of *such claim*, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry . . .

Totten, 380 F.3d at 500 (quoting 31 U.S.C. § 231 (1976) (emphasis added)).

read in conjunction with what is now Section 3729(a)(1): the reference to 'such claim' [in the pre-1982 version] was a shorthand reference to the claim already identified in the current subsection (a)(1) – that is, a claim that would be presented or caused to be presented to the United States." *Id.* at 500. Reading section 3729(a)(2) in concert with section 3729(a)(1), then, the claim to be paid or approved by the Government under (a)(2) would necessarily be a claim presented to the Government, as set forth in (a)(1).

Finally, the court in *Totten* determined that reading section 3729(a)(2) without the requirement of presentment would allow (a)(2) to render section 3729(a)(1) and its presentment requirement virtually meaningless. *Id.* at 501. In most cases in which False Claims Act liability might attach, false records or statements are made or used to get false claims paid or approved. *Id.* Rather than having ever to prove presentment under section 3729(a)(1), then, relators would simply allege violations of section 3729(a)(2). *See id.* To omit the presentment requirement from section 3729(a)(2) would also lead to anomalous results: "a defendant who makes a false record to help someone else get a false claim paid or approved by a grantee [of federal funding] would be covered by the Act, but a defendant who actually presents a false claim to the grantee for payment or approval would not be," as there would be no presentment of the claim to the Government, such as to give rise to liability under section 3729 (a)(1). *Id.* at 501-02.

In addition to the D.C. Circuit's comprehensive analysis of the purpose and legislative history of section 3729(a)(2) in *Totten,* the district court for the Southern District of Ohio has surveyed the various holdings of the Federal Courts of Appeals on the question of whether liability under section 3729(a)(2) requires proof that a false or fraudulent claim has been submitted to the government. *United States ex rel. Sanders v. Allison Engine Co.,* 2005 WL 713569 at *2-4 (S.D. Ohio 2005). The court found that, in at least nine Circuits, a relator is required to show that a false or fraudulent claim was submitted to the Government, in order to state a claim based upon sections 3729(a)(1) and (a)(2). *Id.* at *2. Further, the court found that "no caselaw has been identified nor has any been found that would support the proposition that a violation of subsection (a)(2) of the FCA does not require evidence of the submission of a false or fraudulent claim to the Government." *Id.* Based upon these holdings, in addition to its review of the D.C. Circuit's opinion in *Totten,* the court concluded that liability under section 3729(a)(2) requires a showing that a false or fraudulent claim has been submitted to an officer or employee of the United States Government. *Id.* at *10. The district court for the Eastern District of Louisiana recently reached the same result, dismissing a relator's claim under sections 3729(a)(1) and (a)(2) because the claims at issue had been presented to a grantee of federal funds, rather than to the Government itself. *United States ex rel. Rafizadeh v. Cont'l Common, Inc.*, 2006 WL 980676 at *2-3 (E.D. La. 2006).

While the Fifth Circuit does not appear to have addressed this particular issue, a finding that a claim must be presented to the Government in order to give rise to liability under section 3729(a)(2) is consistent with the court's treatment of the False Claims Act. In *United States v. Southland Management Corp.*, for example, the court noted that "[a]lthough § 3729(a)(2) prohibits the submission of a false record or statement, it does so only when the submission of the record or statement was done in an attempt to get a false claim paid. There is no liability under this Act for a false statement unless it is used to get [a] false claim paid." 326 F.3d 669, 675 (5th Cir. 2003). Because the defendants in *Southland* had made requests to the Government only for housing assistance payments to which they were already entitled under a funding agreement, the Court found that they had not made false claims. *Id.* at 676-77.

Further, as this Court recognized in its May 5, 2005 Order on Defendants' Motions to Dismiss, the Fifth Circuit has found that a person need not personally submit a claim to the Government in order to be liable under the False Claims Act.[3] *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 378 (5th Cir. 2004). In *Riley*, however, a claim

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[3] To the extent that the May 5, 2005 Order might be read to suggest that payment of a claim with Government funds by a recipient of federal funding is enough to give rise to liability under section 3729(a)(2), it is superseded by this Memorandum and Order.

was submitted to the Government, albeit not by the defendants seeking dismissal. *Id.* Thus, *Riley* does not stand for the proposition that it is unnecessary for a claim to be submitted to the Government for liability to attach under section 3729(a)(2); but rather, that a defendant may be liable under sections 3729(a)(1) and (a)(2) even if a different person or entity submits the claim at issue to the Government. *See also Rafizadeh,* 2006 WL 980676 at *2 (noting that *Riley* "still requires that the allegedly fraudulent claim itself be presented to the federal government for payment"). For liability to attach under section 3729(a)(2), therefore, a claim must be presented to the Government for payment or approval.

Relator cites a case from the District Court of the Virgin Islands as being analogous to the one at bar. *United States ex rel. Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp.,* 299 F. Supp. 2d 483 (D. V.I. 2004). In *Virgin Islands,* the court found that the defendant, the president of a construction company that had performed work on housing projects for the Virgin Islands Housing Authority ("VIHA"), was liable for providing false documents to VIHA under both sections 3729(a)(1) and (a)(2). *Id.* at 485-88. VIHA's budget was almost entirely funded by HUD, though it is unclear whether VIHA submitted any claim with respect to the housing projects to HUD or to any other component of the Government. *See id.* at 485 n.1. Without addressing the issue of whether or not a claim had been presented to the Government, the court held that the defendant's criminal

conviction for fraudulent statements established that he had knowingly presented false records to the Government for the purpose of obtaining, or aiding in obtaining, payment or approval. *Id.* at 488.

To the extent that *Virgin Islands* challenges the presentment requirement outlined in *Totten* and other cases discussed above, the Court finds it unpersuasive. Although it appears that *Virgin Islands* may have involved a claim that was paid by a recipient of federal funding, rather than a claim that was presented to the Government for payment or approval, the court never specifically addressed or ruled upon the requirement of presentment of a claim to the Government. Rather, the court's ruling was based, in large part, upon the collateral effect of the defendant's criminal conviction.[4] Any suggestion that *Virgin Islands* eliminates the presentment requirement is also outweighed by the thorough analyses of

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[4] The court found that the defendant's criminal conviction collaterally estopped him from denying that he:

> [K]nowingly and willfully made and caused to be made false, fictitious and fraudulent statements or representations concerning material facts within the jurisdiction of a department of the United States, namely, the Department of Housing and Urban Development, by claiming with supporting documents various costs that were not, in fact, direct costs of the Donoe project, each count in the criminal conviction constituting a separate fraudulent act.

Virgin Islands, 299 F. Supp. 2d at 486.

the presentment requirement undertaken in the cases set forth above.

Relator also attacks the *Totten* opinion, arguing that the Court should adopt the conclusions of the dissent. *See Totten,* 380 F.3d at 502 (Garland, J., dissenting). Relator offers no justification for this contention, however, and the Court is persuaded by the well-reasoned analysis and holding of the *Totten* majority, as well as by the subsequent cases adopting it. Relator also tries to distinguish *Totten* from the case at bar, noting that, in *Totten,* the allegedly false claims were presented to Amtrak, which is not a department, agency, or instrumentality of the Government. *Totten,* 380 F.3d at 491-92. Relator then states that, in the case at bar, "the fraudulent requests for payment were prepared in order to get the disbursement by the City of federal funds approved by the Department of Housing and Urban Development, and the Department of Housing and Urban Development is the Government!" Supp. Rejoinder to Defs.' Mots. for Summ. J. and Mot, to Dismiss at 2 (emphasis omitted). This argument misses the mark. Like Amtrak, the City is not a department, agency, or instrumentality of the Government, and Relator has failed to produce any evidence that the City, HAUL, or anyone else presented a claim to any entity that is a department, agency, or instrumentality of the Government with respect to the City's EHRP. The City's use of previously approved and allocated HUD funds does not constitute the presentment of a claim

to the Government for purposes of the False Claims Act, as discussed below.

The Court finds, for the reasons set forth in *Totten* and subsequent cases, that liability arises under 31 U.S.C. § 3729(a)(2) only when a claim is presented to the United States Government for payment or approval.

2. *Evidence of Presentment of a Claim to the Government*

In supplemental briefing, Defendants argue that Relator has admitted that there is no evidence of "presentment" of a claim to the Government in relation to the City's EHRP. However, it appears from Relator's filings that she believes that the City's withdrawal of federal funds from the line of credit established by HUD constitutes the presentment of a claim to the Government. Relator also appears to view the presentment requirement as being met by the audit authority that HUD maintained over the City's EHRP. Neither of these arguments is meritorious.

Relator asserts that "the use of a letter of credit does not exculpate [D]efendants from liability under the False Claims Act." Resp. to the City's Mot. for Summ. J. at 7. According to Relator, "HUD retains its oversight authority when letters of credit are utilized – it [sic] authority to approve or disapprove what was done." Rejoinder to Defs.' Mots. to Dismiss and for Summ. J. at 8. Relator thus focuses on liability under

section 3729(a)(2) for using false statements to get a false claim paid *or approved* by the Government. Her argument appears to be that, because HUD retained the ability to audit the EHRP, the request for payment forms and other documents created by HAUL and approved by the City were used to get false claims approved by HUD. *See* Resp. to the City's Mot. for Summ. J. at 7 ("Although [the City] drew federal funds using a letter of credit and later disbursed funds to the subrecipients, all expenditures were subject to later audit – i.e., approval or disapproval – by HUD.") (emphasis omitted).

While Relator's claims are factually correct, in that the City withdrew HUD grant funds from a line of credit, and that HUD retained audit power over the EHRP, this does not constitute presentment of a claim to the government. Although the City withdrew the funds from a line of credit, HUD had already approved the grant of the federal funds to the City and, accordingly, had previously established the line of credit for the particular amount of funds granted. The False Claims Act does not reach such claims, where the federal funds at issue have already been provided by the Government. *Totten,* 380 F.3d at 493. Relying upon the present tense of the term "provides" in section 3729(c), the court found in *Totten* that:

> False Claims Act liability will attach if the Government *provides* the funds to the grantee *upon presentment of a claim* to the Government. Liability will also attach if, after the grantee presents the claim, the

> Government *provides* the funds directly to the claimant: the first "if" clause of subsection (c) – unlike the second – does not circumscribe the set of possible recipients of the federal funds. And under the second "if" clause, liability will attach if the Government – again, upon presentment of the claim – reimburses the grantee for funds that the grantee has already disbursed to the claimant.

Id. Thus, for liability to arise under the False Claims Act, the Government must provide federal funds concurrently with a claim being presented to it. *See also United States v. McNinch,* 356 U.S. 595, 599 (1958) (characterizing a claim under the False Claims Act as a "demand for money or for some transfer of public property," which causes the Government to disburse funds or "otherwise suffer immediate financial detriment"); *United States v. Neifert-White Co.,* 390 U.S. 228, 232 (1968) (finding that a statement "made with the purpose and effect of inducing the Government immediately to part with money" was a claim under the False Claims Act).

Here, as Relator admits, HUD allocated funds and provided the line of credit to the City for purposes of its EHRP long before the City withdrew the funds or any HUD audit took place. Katie Worsham, the Director of HUD's Forth Worth Regional Office, explained that "[t]he City tells [HUD] what they plan to do with the money and HUD then gives the City its entitlement funds based on that plan of action;" and that "[t]he City draws down money based upon the

activities that it plans to carry out when it's ready to expend those funds." Worsham Dep. 7:8-10, 22-24, June 6, 2006. Worsham further testified that, once HUD had approved the City's funding and provided the line of credit, the City was able to withdraw and use the money as it saw fit. Worsham Dep. 62:11-16. Because HUD provided the funds to the City well before the City withdrew from the line of credit, and before HUD conducted any audit, neither of these events can constitute presentment of a claim to the Government. Likewise, because HUD provided the funds to the City before any allegedly false documents were made or used by Defendants, the submission of these documents to HUD during the later audit process cannot constitute presentment of a claim to the Government under the False Claims Act.

Moreover, the documents that Relator alleges were false – the request for payment forms and supporting documents – were not submitted to HUD at the time of, or in conjunction with, the City's withdrawal or use of the federal funds. Worsham Dep. 38: 1-2. Although HUD reviewed these documents in its later audit of the EHRP, the City made the documents available to HUD only after it had withdrawn and used the funds, and HUD's subsequent review cannot be construed as a request or demand by Defendants for payment or approval of the funds already granted and used. *See* 31 U.S.C. § 3729(c) (defining a "claim" to include "any request or demand . . . for money or property"). Similarly, the allegedly false documents were not prepared for the

purpose of securing HUD approval of the EHRP during the audit process, but rather, were prepared by HAUL or HAUL's subcontractors in order to obtain reimbursement by the City. There is no evidence that Defendants made or used any of these documents for the purpose of obtaining HUD's payment or approval of a claim, as HUD had approved and provided the federal funds prior to the documents' creation. Although HUD's audit may be construed as a type of "approval" process for the City's EHRP, the relevant point of Government "payment or approval" for purposes of the False Claims Act occurred when HUD approved the City's plan for using the federal funds and established the line of credit from which the City could withdraw the funds at its own discretion.

As Relator herself acknowledges, the evidence presented demonstrates the existence of "false – claims approved and paid with federal funds *by the City of Houston* to its four subrecipients, [including] Houston Area Urban League. . . . " Resp. to City's Mot. for Summ. J. at 2. The Court cannot conclude that the City then presented a claim to HUD for payment or approval simply because the City withdrew funds from a pre-established line of credit or because HUD audited some of the expenditures made by the City with funds previously provided to it. Because Relator has failed to present any evidence demonstrating that claims were ever presented to the Government for payment or approval, Defendants are entitled to summary judgment on Relator's 31 U.S.C. § 3729(a)(2) claim.

C. Claim Under 32 U.S.C. § 3729(a)(3)

In addition to her section 3729(a)(2) claim, Relator alleges that Defendants violated section 3729(a)(3) of the False Claims Act, which provides liability for a person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3). In order to prove the elements of conspiracy under section 3729(a)(3), Relator must show: (1) the existence of an unlawful agreement between the City and HAUL to get a false or fraudulent claim allowed or paid by the Government; and (2) that at least one act was performed in furtherance of this agreement. *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, 284 F. Supp. 2d 487, 509 (S.D. Tex. 2003); *see also United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys.*, 274 F. Supp. 2d 824, 856 (S.D. Tex. 2003). Conspiracy claims under the False Claims Act are governed by general principles of civil conspiracy. *Graves*, 284 F. Supp. 2d at 509. Thus, "[t]he essence of a conspiracy under the Act is an agreement between two or more persons to commit a fraud." *Id.* (citation omitted). In order to establish the existence of a conspiracy, Relator must show that Defendants "shared a specific intent to defraud the [G]overnment." *Reagan*, 274 F. Supp. 2d at 857 (quotation and citation omitted).

Here, Relator has failed to produce any evidence whatsoever that the City and HAUL entered into an agreement to get a false or fraudulent claim paid or approved by the Government, or that Defendants

agreed to commit a fraud. Relator instead makes a number of conclusory references to such an agreement, for example, that "Relator believes that an agreement between the City and [HAUL] to obtain federal funds to which they are not entitled arguably constitutes a conspiracy. It is like stealing money." Resp. to HAUL's Mot. for Summ. J. at 3. Relator's belief that such an agreement existed, however, is not enough to create a genuine issue of fact.

Additionally, Relator argued at the hearing before the Court that the City, through its representative, Mike Halpin, signed the request for payment forms submitted to it by HAUL. These requests for payment were also signed by HAUL prior to being submitted to the City for payment. *See* Rejoinder to Defs.' Mots. to Dismiss and for Summ. J., Ex. C. Relator contends that the signatures of both HAUL and the City on the request for payment forms is circumstantial evidence of a conspiracy. The fact that a City employee signed HAUL's requests for payment from the City, however, does not establish any kind of agreement between the City and HAUL to commit fraud, nor does it show any specific intent to defraud the government. At best, these forms show that the City approved HAUL's requests for payment under the EHRP program. This is not in any way equivalent to an agreement, either express or implied, to get a false or fraudulent claim paid or approved by the Government. The request for payment forms themselves lend no support to Relator's conclusory

allegations of a conspiratorial agreement between the City and HAUL.

Relator also urges that HAUL's certificates of completion, which accompanied the requests for payment, were notarized but not signed by the contractors who had performed work under the EHRP program. *See* Rejoinder to Defs.' Mots. to Dismiss and for Summ. J., Ex. C. Relator argues that this constitutes criminal conduct, and that HAUL's commission of such a crime, coupled with the City's approval of the requests for payment, constitutes evidence of conspiracy. Relator has failed, however, to present any evidence that HAUL's submission of the certificates of completion or the City's acceptance of the certificates of completion constitutes criminal conduct, nor has Relator shown that the contractors' failure to sign the certificates made them false or fraudulent in any way. Moreover, the fact that the City may have accepted incomplete or improper forms from HAUL does not establish that the City and HAUL agreed to engage in any fraudulent conduct, let alone to defraud the Government.

Defendants also assert that the City's and HAUL's different responsibilities and functions with respect to the EHRP demonstrate that they could not have entered into any kind of an agreement to get a false or fraudulent claim paid or approved by the Government. As HAUL points out, "the City and HAUL ha[d] different roles in the [EHRP] (i.e., [the] City is a . . . fund grantee while HAUL is merely a subrecipient), different constituencies, different

personnel administering the EHRP, different forms for processing requests for reimbursement – all of which show a lack of coordination and agreement between the parties." Mot. for Summ. J. at 24. HAUL urges that this shows a "lack of coordination and agreement" between the City and HAUL, which implies that an agreement to defraud the government was impossible. *Id.* While the Court tends to agree, it is Relator's failure to present any evidence of an agreement to defraud the Government between the City and HAUL that defeats her conspiracy claim.[5] Absent evidence of such an agreement to defraud the Government, the mere cooperation between the City and HAUL in the administration of the EHRP does not constitute a conspiracy in violation of section 3729(a)(3) of the False Claims Act. Because Relator has failed to present evidence to create any genuine issue of material fact as to Defendants' alleged agreement to defraud the Government, Defendants are entitled to summary judgment on Relator's 31 U.S.C. § 3729(a)(3) conspiracy claim.

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[5] HAUL also asserts that Relator's section 3729(a)(3) conspiracy claim must be dismissed because Relator cannot prove her underlying section 3729(a)(2) claim. *United States ex rel. Coppock v. Northrup Grumman Corp.*, 2003 WL 21730668 at *14 n.17 (N.D. Tex. 2003) (holding that "where FCA conspiracy liability is based on an underlying claim that has been dismissed, the § 3729(a)(3) claim must also be dismissed"). Because the Court grants-summary judgment for Defendants on Relator's section 3729(a)(2) claim, this provides an additional basis upon which Relator's section 3729(a)(3) claim fails.

III. CONCLUSION

Defendant City of Houston's Motion for Summary Judgment and Defendant Houston Area Urban League's Motion for Summary Judgment are **GRANTED**, and Relator's claims under the False Claims Act, 31 U.S.C. § 3729(a)(2) and (a)(3) are **DISMISSED WITH PREJUDICE**. Defendant City of Houston's Motion to Dismiss for Lack of Subject Matter Jurisdiction is **DENIED as MOOT**.

IT IS SO ORDERED.

SIGNED this 16th day of August, 2006.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, *et al*,	§	
	§	
Plaintiffs,	§	**CIVIL ACTION**
	§	**NO. H-03-03713**
v.	§	
CITY OF HOUSTON, *et al*,	§	
	§	
Defendants.	§	

FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58(a), and for the reasons stated in the accompanying Memorandum and Order, this action is **DISMISSED WITH PREJUDICE.**

IT IS ORDERED.

SIGNED this 16th day of August, 2006.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA ex rel. MARSHA FARMER,	§	**CIVIL ACTION NO. H-03-3713**
Plaintiffs,	§	
v.	§	
CITY OF HOUSTON, et al.,	§	
Defendants.	§	

MEMORANDUM AND ORDER

At a hearing held on October 5, 2006, the Court denied Defendant City of Houston's Request to Enter Bill of Costs (Doc. #144) and Defendant Houston Area Urban League's Request to Enter Bill of Costs (Doc. #150). The Court now writes to set forth the reasons for the denial for the record. *See Sheets v. Yamaha Motors Corp., U.S.A.*, 891 F.2d 533, 539 (5th Cir. 1990) ("[T]he district court is required to provide justification for its actions [when it refuses to award costs to the prevailing party].").

I. Background

Relator Marsha Farmer filed a *qui tam* action against Defendants City of Houston ("the City") and the Houston Area Urban League ("HAUL") under the False Claims Act ("FCA"). Ms. Farmer alleged that the City's Emergency Home Repair Program, which

was administered jointly by the City and HAUL, made fraudulent use of funds made available for the program through a grant from the United States Department of Housing and Urban Development ("HUD"). Both the City and HAUL filed motions for summary judgment seeking dismissal of Ms. Farmer's action, and these motions were granted by the Court on the ground that the alleged false claims for payment were not presented to the United States Government as required by the FCA. Nevertheless, despite Ms. Farmer's failure to prevail on her legal claims, her lawsuit may have been partly responsible for prompting HUD to shut down the City's Emergency Home Repair Program.

Final judgment in favor of the City and HAUL was entered on August 16, 2006. The City filed its bill of costs totaling $17,332.12 on August 30, 2006, and HAUL filed its bill of costs totaling $15,337.38 on September 13, 2006.

II. Defendant Houston Area Urban League shall bear its own costs

The refusal to award costs to HAUL is based on the untimely filing of its bill of costs. Local Rule 54.2 states, "An application for costs shall be made by filing a bill of costs within 14 days of the entry of final judgment." Here, final judgment was entered on August 16, 2006, but HAUL did not file its bill of costs until 28 days later, on September 13, 2006. HAUL could not present the Court with any good

cause for the delay, and thus HAUL's request to enter a bill of costs is **DENIED**.

III. Defendant City of Houston shall bear its own costs.

The City's bill of costs, on the other hand, was timely filed; however the Court refuses to award costs on other grounds. While it is true that prevailing parties enjoy a strong presumption that they will be awarded costs, Rule 54(d) of the Federal Rules of Civil Procedure permits a district court to exercise its discretion. *See Hall v. State Farm Fire & Cas. Co.*, 937 F.2d 210, 216 (5th Cir. 1991) ("A trial judge has wide discretion with regard to costs in a case and may order each party to bear his own costs."). In this case, three factors lead the Court to the conclusion that costs should lie where they have fallen. First, this case involved close questions of law that were litigated by Ms. Farmer in good faith. *See Moody Nat'l Bank of Galveston v. GE Life & Annuity Assurance Co.*, 423 F. Supp. 2d 651, 652 (S.D. Tex. 2003) (refusing to award costs to prevailing party "because the case involved close questions of law and because the Court found that [plaintiff] brought suit in good faith"). Ms. Farmer filed suit in 2003, nearly one full year before the D.C. Circuit decided in *United States ex rel. Totten v. Bombardier Corp.* that the FCA required false claims to be presented to the federal government. 380 F.3d 488 (D.C. Cir. 2004). Thus, the legal issue was a close one, and there was never an indication that Ms. Farmer proceeded in pursuing her claim in anything other than good faith.

Second, Ms. Farmer and her attorney were forced to go to some trouble to get discovery, as evidenced by her Motion to Compel which was granted in part by the Court. *See Moody Nat'l Bank*, 423 F. Supp. 2d at 652 (refusing to award costs to prevailing party when its actions "unnecessarily extended the time necessary for the action to be resolved").

Finally, even though Ms. Farmer's legal claims failed, the litigation was productive in that it led to the City's Emergency Home Repair Program being shut down by HUD. Thus, because Ms. Farmer did some achieve some level of success, because she had to seek Court intervention to obtain discovery, and because she litigated close questions of law in the utmost good faith, the Court rules that the City's request to enter a bill of costs in **DENIED**.

IV. Conclusion

Both the City's and HAUL's requests to enter a bill of costs are denied. All parties shall bear their own costs in this matter.

IT IS SO ORDERED.

SIGNED this 16th day of October, 2006.

/s/ Keith P. Ellison
KEITH P. ELLISON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20740

UNITED STATES OF AMERICA, ex rel,
MARSHA FARMER

Plaintiff-Appellant

v.

CITY OF HOUSTON; HOUSTON AREA
URBAN LEAGUE

Defendants-Appellees

Appeal from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 2, 2008)

(Opinion 3/25/08, 5 Cir., ___, ___ F.3d ___)

Before JONES, Chief Judge, REAVLEY and SMITH, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having

requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge

REHG-6a

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June 16, 2008

Mr. Charles R. Fulbruge, III
Clerk
United States Court of Appeals
Fifth Circuit
600 S. Maestri Place
New Orleans, Louisiana 70130

Re: Cause No. 06-20740; United States of America ex rel. Marsha Farmer v. City of Houston and Houston Area Urban League

Dear Mr. Fulbruge, III:

On June 9th, the same day that Appellant Marsha Farmer filed her Motion to Stay the Mandate in this case, the Supreme Court of the United States decided *Allison Engine Co., Inc., et al* v. *United States ex rel Sanders et al.*, Cause No. 07214, holding, at pages 7 and 8 of the opinion, that 31 U.S.C. #3729(a)(2) does *not* require proof that a false record or statement be presented to the Government.

> "What #3729(a)(2) demands is not proof that the defendant caused a false record or statement to be presented or submitted to

> the Government but that the defendant made a false record or statement for the purpose of getting 'a false or fraudulent claim paid or approved by the Government.' Therefore, a subcontractor violates #3729(a)(2) if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim." (Opinion, 8.)

The decision of the district court in the case at bar was based on a presentment requirement which the Supreme Court has now held does not exist. Marsha Farmer would like to point this out in her proposed petition for certiorari. (We would have mentioned this in her Motion to Stay the Mandate but we did not learn of the decision until shortly after we forwarded that Motion to the court for filing.)

It is noteworthy that the decision was unanimous. On the issue a presentment it implicitly overrules *United States ex rel. Totten* v. *Bombardier Corp.*, 380 F.3d 488 (CADC 2004), cert denied, 544 U.S. 1032 (2005).

A copy of the opinion is enclosed for distribution to the panel and a copy of this letter and of the opinion are furnished herewith to all counsel of record.

Since preparing this letter we have just learned, by checking the docket, that the Court denied the motion to Stay the Mandate on June 13th. Appellant

requests that the Court reconsider its ruling in the light of the foregoing information.

Very truly yours,

/s/ Brantly Harris
Brantly Harris

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